EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

(7)

No. 84-1531-CSY Title: Michigan, Petitioner
Status: GRANTED v.
Robert Bernard Jackson

Docketed: Court: Supreme Court of Michigan
March 27, 1985

Counsel for petitioner: Faughman, Timothy A.

Vide:
84-1539 Counsel for respondent: Krogsrud, James

Entry	Date	Note	Proceedings and Orders
1	Mar 27 1985	C	Petition for writ of certiorari filed.
2	Mar 27 1985		Appendix of petitioner Michigan filed.
3	Apr 22 1985		Brief of respondent Robert Bernard Jackson in opposition filed.
4	Apr 22 1985	G	Motion of respondent for leave to proceed in forma pauperis filed.
5	Apr 24 1985		DISTRIBUTED. May 9, 1985
7	May 10 1985		REDISTRIBUTED. May 16, 1985
9	May 17 1985		REDISTRIBUTED. May 23, 1985
10	May 28 1985		Motion of respondent for leave to proceed in forma pauperis GRANTED.
11	May 28 1985		Petition GRANTED. The case is consolidated with 84-1539, and a total of one hour is allotted for oral argument.
12	Jun 15 1985	G	Motion of respondent for appointment of counsel filed.
13	Jun 21 1985		DISTRIBUTED. June 27, 1985. (Motion of respondent for appointment of counsel).
14	Jul 1 1985		Motion for appointment of counsel GRANTED and it is ordered that James Krogsrud, Esquire, of Detroit, Michigan, is appointed to serve as counsel for the respondent in this case.
15	Jul 11 1985		Joint appendix filed.
16	Jul 11 1985		Brief of petitioner Michigan filed.
17	Aug 7 1985		Brief of respondent Robert Bernard Jackson filed.
18	Sep 3 1985	C	Motion of respondents for divided argument filed.
19	Sep 16 1985	D	Motion of petitioner for divided argument filed.
20	Oct 7 1985		Motion of respondents for divided argument GRANTED.
21	Oct 7 1985		Motion of petitioner for divided argument DENIED.
22	Oct 22 1985		SET FOR ARGUMENT, Monday, December 9, 1985. (2nd case).
23	Oct 21 1985	D	Motion of petitioner to reconsider order denying motion for divided argument filed.
24	Oct 23 1985		CIRCULATED.
25	Nov 4 1985		Motion of petitioner to reconsider order denying motion for divided argument DENIED.
26	Dec 9 1985		ARGUED.

84-1531

No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

THE PEOPLE OF THE STATE OF MICHIGAN,
PETITIONER

vs.

ROBERT BERNARD JACKSON,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

JOHN D. O'HAIR
Wayne County Prosecuting Attorney

EDWARD REILLY WILSON
Deputy Chief, Civil and Appeals

A. GEORGE BEST II (P-27749)
Assistant Prosecuting Attorney
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5836

27 pp

QUESTION PRESENTED

SHOULD PLENARY REVIEW BE GRANTED BY THIS COURT TO RESOLVE THE SPLIT IN FEDERAL CIRCUITS AND STATE SUPREME COURTS AS TO THE CONSTITUTIONAL APPROPRIATENESS UNDER THE SIXTH AMENDMENT OF POST-INDICTMENT QUESTIONING OF THE ACCUSED BY THE POLICE, AND TO REVIEW PARTICULARLY THE HOLDING HERE BY THE MICHIGAN SUPREME COURT THAT THE SIXTH AMENDMENT REQUIRES THAT THE POLICE REFRAIN FROM ANY QUESTIONING OF THE ACCUSED AFTER THE INSTITUTION OF JUDICIAL PROCEEDINGS UNLESS THE DEFENDANT HIMSELF INITIATES THE CONTACT?

TABLE OF CONTENTS

INDEX OF AUTHORITIES

INDEX OF AUTHORITIES Cont.

No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

THE PEOPLE OF THE STATE OF MICHIGAN,

PETITIONER

vs.

ROBERT BERNARD JACKSON,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI

TO THE MICHIGAN SUPREME COURT

NOW COME the People of the State of Michigan, by JOHN D. O'HAIR, Prosecuting Attorney for the County of Wayne, EDWARD

REILLY WILSON, Deputy Chief, Civil and Appeals, and A. GEORGE BEST II, Assistant Prosecuting Attorney, and prays that a writ of certiorari issue to review the judgement of the Michigan Supreme Court entered in the above entitled cause on 29 January 1985.

OPINIONS BELOW

Respondent's conviction for second degree murder and conspiracy to commit second degree murder was partially affirmed by the Michigan Court of Appeals, People v Jackson, 114 Mich App 649 (1982). The Court of Appeals reversed the conspiracy count but affirmed the substantive second degree murder count. (Appendix A.)

Respondent's request for review in the

Michigan Supreme Court was granted and that court, in an opinion filed on 28 December 1984 but released on 29 January 1985, held that the respondent was entitled to a new trial because several confessions made by him were obtained in violation of his federal Sixth Amendment right to counsel. (Appendix B.)

STATEMENT OF JURISDICTION

The opinion of the Michigan Supreme Court was released on 28 January 1985. The jurisdiction of this Honorable Court is invoked under and pursuant to 28 USCA 1257(3).

CONSTUTITIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant

v Knight, 122 MichApp 584 (1983).

The defendant made a total of seven confessions after his arrest. Three were made on the day of his arrest, of which two were tape recorded and one was oral. The following day, respondent agreed to take a polygraph. He "flunked" the polygraph and then gave a fourth statement to the examiner (oral) in which he admitted he was the shooter. A fifth (oral) and sixth statement (written) were then taken by the arresting officer. The final and seventh statement was taken the next day (taped).

The trial theory of the Petitioner, as was supported by the proofs, was that the wife of the deceased actively sought out someone to kill her husband for the reason that their divorce was imminent.

She was aware that she would reveive no alimony from that divorce and that, were her husband killed prior to the divorce, she would receive substantial insurance benefits. Perry thus hired Knight and Jackson, provided a detailed description of her husband and his habits, and agreed to leave open the door between the residence address and the connected garage to ease their entry.

The deceased was killed by seven bullets, entry to the house was made through the connected garage, the murder weapon was recovered, certain stolen property was recovered, as was a letter JACKSON wrote to his girlfriend in which he made reference to "things being alright" if he had gotten a large sum of money.

Co-defendant Knight provided testimony that directly linked JACKSON to the killing, JACKSON himself confessed that he was the shooter.

REASONS FOR GRANTING THE WRIT

THE MICHIGAN SUPREME COURT ERRONEOUSLY INTERPRETED THE FEDERAL CONSTITUTION AND INCORRECTLY RESOLVED THE SPLIT EXISTING IN THE FEDERAL CIRCUITS BY HOLDING THAT STATEMENTS GIVEN TO POLICE BY A DEFENDANT AFTER AN ARRAIGNMENT AT WHICH COUNSEL WAS APPOINTED FOR HIM AND AFTER HE WAS PROPERLY GIVEN THE MIRANDA REQUIRED WARNINGS MUST BE SUPPRESSED FOR THE REASON THAT COUNSEL WAS NOT PRESENT PRIOR TO THOSE STATEMENTS BEING GIVEN AND BECAUSE THE POLICE DID NOT ADVISE

THE DEFENDANT OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL PRIOR TO THE TAKING OF THOSE STATEMENTS.

The Michigan Supreme Court correctly noted that this defendant gave a total of seven confessions after his arrest. Three were made on the day of his arrest, of which two were tape recorded and one was oral. The following day, respondent agreed to take a polygraph. He "flunked" the polygraph and then gave a fourth statement to the examiner (oral) in which he admitted he was the shooter. A fifth (oral) and sixth statement (written) were then taken by the arresting officer. The final and seventh statement was taken the next day (taped). In their opinion, the Michigan Supreme Court held that the fourth, fifth, and sixth statements were obtained as as result of the violation of

a state "prompt-arraignment" statute. The Petitioner recognizes that this decision is not before this Honorable Court. The Michigan Supreme Court also suppressed the seventh statement based on its finding of a violation of federal constitutional precepts regarding the existance and waiver of the Sixth Amendment right extant after arraignment and appointment of counsel. This is the sole issue presented to this Honorable Court by Petitioner. Even though a re-trial of this respondent must be held, it is vital that this seventh statement be found to be admissible for the reason that in it, respondent admits that he was in fact the shooter, contrary to his earlier, admissible, statements. Thus, this petition presents a "live" issue to this Honorable Court.

The Michigan Supreme Court addressed the issue presented by respondent in his appeal in the following manner;

> The...issue presented is whether statements obtained after a defendant has requested appointment of counsel at arraignment are admissible pursuant to the principles enunciated in Edwards v Arizona, 451 US 477; 101 S.Ct. 1880; 68 LEd2d 378 (1981) and People v Paintman, 412 Mich 518; 315 NW2d 418 (1982), cert. den., 456 US 995; 102 S. Ct. 2280; 73 LE2d 1292 (1982). (Slip Opinion, page 1).

The Michigan Supreme Court addressed defendant's argument that his Fifth and Sixth Amendment rights had been violated

by initially posing a series of questions:

> 1) What constitutional right(s) to counsel attached at the post-arraignment interrogations?
>
> 2) What right(s) to counsel did defendants invoke when they requested counsel at arraignment?
>
> 3) What right(s) to counsel did defendants purportedly waive prior to their post-arraignment interrogations? (Slip Opinion, page 6).

After analyzing the origin and meaning of the "right to counsel", the Court held, in answer to the first question posed, that since respondent was subjected to custodial interrogation when he

made his post-arraignment confession, his Fifth Amendment right to counsel had attached. The Court also found that since the arraignment represented the "initiation of adversary judicial proceedings", he also was "entitled to counsel under the Sixth Amendment". (Slip opinion, page 7). The Court's answer was based on the federal constitution and its interpretative case law. The Court mentioned only in passing Article 1, Section 20 of the Michigan Constitution. (Slip Opinion, page 6, footnote 14). To this the Petitioner does not disagree.

In answer to the second question, the Court held that the request to the arraigning magistrate for counsel "implicated only" defendants Sixth Amendment right to counsel. The Court recognized that respondent requested appointed

counsel only because he was "financially incapable of retaining an attorney" and was unwilling to represent himself". (Slip Opinion, page 8). To this also, the Petitioner does not disagree.

In answer to the third question, the Court found that the trial court's conclusion that respondent had never invoked his Fifth Amendment right to counsel prior to or after arraignment and had waived his Fifth Amendment right to counsel after arraignment was "not clearly erroneous". The Petitioner also agrees with this finding. The Court then noted that the issue thus became whether the waiver of the Fifth Amendment right also waived the Sixth Amendment right. (Slip Opinion, page 8). The Court found that the Sixth Amendment right was "considerably broader" than the Fifth

Amendment right and that "(n)either the United States Supreme Court nor this court has delineated specific procedural requirements for waiver of the Sixth Amendment right to counsel". (Slip Opinion, page 9). The Court then proceeded to address what type waiver is required after arraignment. The analysis used was based entirely on federal case law precedents (primairly Edwards v Arizona, 451 US 477; 101 S.Ct. 1880; 68 LEd2d 378 (1981)) and those from other states. The only Michigan case law precedent relied on, People v Paintman, 412 Mich 518; 315 NW2d 418 (1982), cert. den., 456 US 995; 102 S.Ct. 2280; 73 LE2d 1292 (1982), was itself based on Edwards, supra. The Michigan Constitution was not even mentioned in passing.

The Court noted that various federal

Circuit Courts have reached different results "both before and after Edwards was decided", citing United States v Satterfield, 558 F2d 655 (CA2-1976); United States v Mohabir, 624 F2d 1140 (CA2-1980); Blassingame v Estelle, 604 F2d 893 (CA5-1979); Silva v Estelle, 672 F2d 457 (CA5-1982); Jordan v Watkins, 681 F2d 1967 (CA5-1982); United States v Campbell, 721 F2d 578 (CA6-1983). Reference to the split within the state courts that have addressed this question was also noted. Johnson v Commonwealth, 220 Va 146, 255 SE2d 525 (1979), Cert. Den., 454 US 920, 70 LEd2d 231 (1981); State v Sparklin, 296 Or 85, 672 P2d 1182 (1983); and State v Wyer, ___ W Va ___, 320 SE2d 92 (1984).

After noting all of these precedents, the Michigan Court avered that "no con-

sistent approach to the waiver problem has emerged". (Slip Opinion, 16). The Court then held that;

> We decline to follow the reasoning of those cases which have found valid Sixth Amendment waivers after a request for counsel has been made to a magistrate based solely on waivers of Miranda rights. (Slip Opinion, 18).

The Court then held however that;

> We need not decide at this time whether stricter procedural standards for waiver of the Sixth Amendment right to counsel are required. We need only hold here that, <u>at a minimum</u>, the <u>Edwards/ Paintman</u> rule applies by analogy to

> those situations where an accused requests counsel before the arraigning magistrate. Once this request occurs, the police may not conduct further interrogations until counsel has been made available to the accused, unless the accused initiates further communications, exchanges, or conversations with the police. If a defendant chooses to reinitiate communications, he must be sufficiently aware of both his Fifth and Sixth Amendment rights to effectuate a voluntary, knowing, and intelligent waiver of each right. (Slip Opinion, 18, emphasis in original).

Choosing to apply <u>Edwards</u>, <u>supra</u>, "by analogy" to this case, the Court then

dismissed the argument advanced by Petitioner, based on Solem v Stumes, ___ US ___, 79 LEd2d 579 (1984), that Edwards, supra, was not retroactive, by finding that this case did not involve the same Fifth Amendment question as was present in Edwards, supra, thus, its retroactive application to this case need not be addressed. The Court then promptly held that the rule established in this case would apply only to this case, to cases now on appeal which had preserved the issue, and to future cases. (Slip Opinion, 20).

It is the position of the Petitioner that the resolution of the decisional split of the federal circuits and state courts by the Michigan Supreme Court was and is incorrect. The Petitioner believes that the correct rule of law is that, as

in Edwards and Paintman, supra, where a criminal defendant requests the assistance of counsel before talking to the police, interrogation must cease and counsel must either be provided or the defendant must be shown to have both re-initiated contact and to have waived the presence of the earlier requested counsel. A mere assertion at arraignment of the desire to have state-paid defense counsel is not an assertion of the right to the presence of counsel at all further police-defendant contacts. Where the criminal defendant, after being fully advised of his Miranda rights, decides to cooperate with the police, the Miranda waiver fully supports whatever Sixth Amendment counsel right the defendant may have. As noted by the Michigan Supreme Court, "the average person" is not generally sophisticated enough to recog-

nize or understand the fine distinctions between Fifth and Sixth Amendment counsel rights. (Slip Opinion, 16). Thus, it is only logical that a defendant's awareness of his Fifth Amendment right to counsel is sufficient in and of itself to protect his Sixth Amendment rights. As also found by the Michigan Supreme Court, the record in this case establishes both that this defendant was repeatedly given his Miranda warnings and that he repeatedly waived the right to counsel enunciated in those warnings. The insertion of yet another layer of "official" advisement would thus be totally meaningless. It must also be noted that the Supreme Court itself did not set forth any specific guidance for the police as to what additional warnings they must provide after arraignment to obtain a Sixth Amendment waiver. Thus, the situation

now obtains that the police do not know what to advise the defendant of after arraignment and the defendant would not understand that additional advice even were it given.

CONCLUSION AND RELIEF

WHEREFORE, for those reasons presented above, the Petitioner respectfully requests that this Honorable Court either grant certiorari and hear this case or, in the alternative, summarily reverse the decision of the Michigan Supreme Court.

Respectfully submitted,

JOHN D. O'HAIR
Prosecuting Attorney
County of Wayne

EDWARD REILLY WILSON
Deputy Chief, Civil and Appeals

A. GEORGE BEST II (P-27749)
Assistant Prosecuting Attorney
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: 224-5827

Dated: February 28, 1985

AGB/rh

84-1531

No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

THE PEOPLE OF THE STATE OF MICHIGAN,
PETITIONER

vs.

ROBERT BERNARD JACKSON,
RESPONDENT

APPENDIX

JOHN D. O'HAIR
Wayne County Prosecuting Attorney

EDWARD REILLY WILSON
Deputy Chief, Civil and Appeals

A. GEORGE BEST II (P-27749)
Assistant Prosecuting Attorney
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5836

131pp

OPINION OF THE MICHIGAN COURT OF APPEALS

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

V

APRIL 5, 1982

ROBERT BERNARD JACKSON,
Defendant-Appellant.

Docket No. 51655

Before: Danhof, C.J., and J.H. Gillis and Bronson, JJ.

Danhof, C.J. Following a jury trial defendant was found guilty of murder in the second degree, MCL 750.317; MSA 28.549, and conspiracy to commit murder in the second degree, MCL 750.157a; MSA 28.354(1) and MCL 750.317; MSA 28.549. He was sentenced to two concurrent terms of life imprisonment. Defendant appeals as of right.

Defendant's conviction arose from the shooting death of Rothbe Elwood Perry.

Defendant and a codefendant, Mildred Perry, the victim's wife, were tried together by separate juries. Two other codefendants, Michael White and Chare (also known as Charles) Knight, had their cases severed from that of defendant.

I

DID THE TRIAL COURT ERR IN FINDING THAT DEFENDANT'S CONFESSIONS WERE VOLUNTARY AND ADMISSIBLE?

The record in the instant case indicates that on July 30, 1979, codefendant Chare Knight confessed to the crime and implicated defendant, who was arrested by the Detroit police that same day. On July 31, 1979, at approximately 2 p.m., defendant was transferred to the custody

of the Livonia police and transported to the Livonia Police Station. At approximately 3:30 p.m. defendant made his first oral confession. Defendant made tape recorded confessions at 5:52 p.m. and again at 8:48 p.m. because of the poor quality of the 5:52 p.m. tape recording. On August 1, 1979, at approximately 10:00 a.m., defendant took a polygraph exam and then made another oral confession. At 12:30 p.m. that same day defendant made a written confession. Defendant was arraigned at 4:30 p.m. on August 1, 1979. Defendant requested an attorney at the time of his arraignment. At approximately 10 a.m. on August 2, 1979, defendant made another confession.

A Walker[1] hearing was held prior to

[1] People v Walker (On Rehearing), 374 Mich 331; 132 NW2d 87 (1965).

trial. At the conclusion of the hearing, the court found that all of the incriminating statements made by defendant were voluntary and admissible.

Defendant initially argues that the trial court should have suppressed his confessions made prior to arraignment because the delay in arraigning defendant was used to exert psychological pressure and to extract his confession.

Unnecessary delay between arrest and arraignment is prohibited by MCL 764.26; MSA 28.885. However, this statute does not automatically require suppression of an incriminating statement where there has been a delay between arrest and arraignment. People v Ewing (On Remand), 102 MichApp 81, 85; 300 NW2d 742 (1980). See also People v Hamilton, 359 Mich 410,

416-417; 102 NW2d 738 (1960). Rather, an incriminating statement should only be used as a tool to extract the statement. People v White, 392 Mich 404, 424; 221 NW2d 357 (1974), People v Antonio Johnson, 85 MichApp 247; 271 NW2d 177 (1978).

Upon review of the testimony presented at the Walker hearing, we are not persuaded that the delay between's arrest and arraignment was used to extract a confession. During this time period, each of the questioning sessions was preceded by Miranda[2] warnings and, if the testimony of the officers present during the sessions is believed, defendant volunteered his statements. Since we do not possess a definite and firm conviction

[2] Miranda v Arizona, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

that the trial court erred in finding that defendant's statements were voluntary and admissible, that determination is affirmed. People v McGillen #1, 392 Mich 251, 257; 22 NW2d 677 (1974).

Defendant next argues that his August 2, 1979, confession should have been suppressed because counsel was not present at that confession even though defendant had requested counsel at his arraignment. Defendant acknowledges that Miranda warnings were given before the August 2, 1979, confession but asserts that these warnings were not sufficient to establish a knowing and intelligent waiver.

An almost identical fact situation was addressed in People v Bladel, 106 MichApp 397; 308 NW2d 230 (1981). After extensively reviewing the law in this area,

Bladel held that the question of a knowledgeable and voluntary waiver after the right to counsel has once been asserted requires a review of the individual circumstances of the particular case, with the prosecution carrying a heavy burden in proving that defendant's waiver was knowledgeable and voluntary. See also People v Parker, 84 MichApp 447; 269 NW2d 635 (1978). Applying this standard to the instant case, we would find that the prosecution has established a knowledgeable and voluntary waiver of defendant's right to counsel on August 2, 1979.

However, the Supreme Court's recent decision in People v Paintman, 412 Mich 518; 315 NW2d 418 (1982), requires us to reexamine the appropriateness of applying the standards set out in Bladel to the facts of the instant case.

Paintman involved the consolidated appeals of two defendants, Paintman and Conklin. Both Paintman and Conklin requested counsel when questioned by police following their arrest. They again asked for attorneys when arraigned. Paintman's incriminating statement was made, apparently, three days after his arraignment. Conklin's incriminating statement was made nine days after his arrest and initial request for counsel and seven days after his arraignment. Officers were aware at the time Conklin made his statement that he was represented by counsel, but did not contact his attorney. The Court described some of the pressures on the defendants as follows:

> "Paintman was an admitted heroin addict with a $60 to $80 daily habit. He suffered withdrawal

symptoms in the days preceding his statement. He was the target of derisive comments such as "baby killer" from both inmates and jail personnel because one of his alleged victims was a young child. There also was testimony about Paintman's suicidal mood. Further***Paintman told jail personnel prior to making his statement that he didn't wish to talk with police. That desire was answered by detectives appearing at the jail later in the day.

"Conklin was placed in a line-up the day after his arrest and spent most of his time in solitary confinement following his request for an attorney. He was taken out of the maximum security area after he confessed." Id., 527-528.

Relying on Edwards v Arizona, 451 US 477; 101 S Ct 1880; 68 L Ed 2d 378 (1981), which had a fact situation similar to that in Paintman, the Court held Paintman's and Conklin's statements should have been suppressed since those statements were taken in violation of Miranda. In reaching this decision the Court cited the following passage from Edwards:

> "'[A]n accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police.' Id. (Emphasis

> added.)" Paintman, supra, 525.

The Paintman Court went on to state:

> "The Edwards Court emphasized, and we hold, that it is inconsistent with Miranda and its progeny for authorities to instigate a reinterrogation of an accused in custody who has clearly asserted the right to counsel. There is little doubt that both Paintman and Conklin clearly asserted their rights to counsel. In fact, their resistance to questioning continued unabated for a period of days.
>
> "In Conklin's case, authorities were not only aware that he had requested counsel, but that counsel had been appointed and had filed an appearance. In Paintman's case, he

first indicated his desire to speak with an attorney in response to a direct question by the chief assistant prosecutor. The prosecutor then left, but police continued to talk with defendant.

"Of what significance is invocation of a cherished constitutional right if it is ignored by the hearer and, in fact, only seems to exacerbate the defendant's plight? As the time gap increases between the embracing of the right and its fulfillment, the certainty of its existence must surely dim." (Footnote deleted.) Paintman, supra, 529-530.

After carefully reviewing the facts of Edwards and Paintman, and the rationale

for those decisions, we conclude that they do not require suppression of defendant's August 2, 1979, confession. We think there is an important distinction between asking for an attorney when questioned by police, as was the case in Edwards and Paintman,[3] and asking for appointment of an attorney at arraignment, as was the situation in the instant case. This difference was pointed out by the court in Blasingame v Estelle, 604 F2d 893, 895-896 (CA 5, 1979), where it

---

[3] We recognize that the defendants in Paintman asked for attorneys when questioned by police and at their arraignments. However, we view the reference to the request for appointment of counsel at arraignment as being a further indication that the defendants had clearly requested that they have counsel when dealing with the police. We do not view the reference to the fact that the defendants requested counsel at arraignment as standing for the principle that this request, alone, would bar the police from thereafter asking defendants if they wished to make any statements.

stated:

> "[S]ome defendants may well wish to have an attorney to represent them in legal proceedings, yet wish to assist the investigation by talking to an investigating officer without an attorney present. 'While the suspect has an absolute right to terminate station-house interrogation, he also has the prerogative to then and there answer questions, if that be his choice.' Nash [v Estelle, 597 F2d 513, 517 (CA 5, 1979)]. To hold that a request for appointment of an attorney at arraignment would bar an investigating officer from later finding out if defendant wishes to exercise this prerogative would transform the Miranda safeguards, among which

> is the right to obtain appointed counsel, 'into wholly irrational obstacles and deprive suspects of an opportunity to make informed and intelligent assessments of their interests.' Michigan v Mosley, 423 US 96, 102; 96 S Ct 321, 326; 41 L Ed 2d 313 (1975).
>
> "Therefore, we hold that the request for an attorney at arraignment does not prevent subsequent station-house interrogation where the request at arraignment is not made in such a way as to effectively exercise the right to preclude any subsequent interrogation."

In the instant case defendant never requested counsel when questioned by the police. He only requested appointment of

counsel at his arraignment on the afternoon of August 1, 1979. However, this request for appointment of counsel was not made in such a way as to effectively exercise the right to preclude any subsequent interrogation. Rather, the circumstances surrounding defendant's request for counsel show it to have been unrelated to the Fifth Amendment right to confer with or have counsel present before answering any questions. Blasingame, supra. In this regard the instant case is distsinguishable from Paintman and Edwards. Because of this crucial distinction, we conclude that the trial court did not err in not suppressing defendant's August 2, 1979, statement.

II

BY WARNING A WITNESS ABOUT THE PENALTY FOR PERJURY, DID THE TRIAL COURT DENY DEFENDANT HIS RIGHT TO DUE PROCESS AND HIS RIGHT TO CONFRONT WITNESSES?

One of defendant's alleged coconspirators, Chare Knight, testified at defendant's preliminary examination. This testimony was given pursuant to a plea bargain. In return for Knight's preliminary examination testimony and a promise to testify at defendant's trial, Knight would be allowed to plead guilty to second-degree murder and the prosecutor would recommend a sentence of 10 to 15 years imprisonment. It was also agreed that should this deal "fall through" Knight's preliminary examination testi-

mony would not be used against him at any subsequent prosecution.

Just before Knight was to testify at defendant's trial, the prosecution was informed, for the first time, that Knight would invoke his Fifth Amendment privilege against self-incrimination and that he would move to withdraw his guilty plea, which had, by that time, been entered. Informed of these events, the trial court ruled that Knight's preliminary examination testimony could be read to the jury since Knight was not available as a witness.

On the next day of trial, the court was informed that Knight had again changed his mind and would testify. Knight's change of mind was communicated

to the trial court by his attorney. At this time, Knight's attorney informed the trial court that he could no longer ethically continue to represent Knight and, therefore, requested that he be allowed to withdraw.[4] At this point the trial court asked Knight if he wanted to waive his privilege against self-incrimination and testify. Knight responded affirmatively, and the trial court informed Knight that if he did testify anything he said could be used against him in a subsequent trial and that if he did not testify truthfully he could be subject to prosecution for perjury. After this colloquy Knight informed the trial court

---

4 In People v Collier, 105 MichApp 46; 306 NW2d 387 (1981), we recognized that where defense counsel has prior knowledge that his client seeks to present perjured testimony, he may be required to withdraw from representing that client.

that he did not want to testify. Subsequently, Knight's preliminary examination testimony was read to the jury.

Relying primarily on Webb v Texas, 409 US 95; 93 S Ct 351; 34 L Ed 2d 330 (1972), defendant argues that his conviction must be set aside in that the trial court "threatened" Knight with perjury, drove him off the stand, and thereby denied defendant his right to confront and cross-examine a key witness.

Our review of the facts of Webb and the rationale for that decision lead us to conclude that no reversible error occurred in the instant case. The egregious harangue of the trial judge in Webb, which was obviously calculated to silence the defense witness, is not present in the instant case. Rather, here

the trial judge's remarks were designed not only to protect the integrity of the trial process but also to protect the interest of the witness.

We wish to emphasize that where a witness is singled out by the trial judge (or, for that matter, by the prosecution) and threatened so that he is effectively driven off the witness stand, error will have occurred. See Webb, supra, and People v Pena, 383 Mich 402; 175 NW2d 767 (1970). However, as the Supreme Court's decision in People v Wein, 382 Mich 588; 171 NW2d 439 (1969), and this Court's decision in People v Collier, 105 MichApp 46; 306 NW2d 387 (1981), indicate, a criminal trial will not be allowed to become a game wherein the truth is concealed with the assistance of the law. In the instant case, the trial judge, in

light of the strong possibility of perjured testimony being given by Knight, was under a duty to ensure the proper administration of justice and to conduct the trial in such way that the discovery of the truth and the application of the law could occur unhindered. Under the facts of this case, no error occurred in the trial judge's remarks to Knight.

III

WAS DEFENDANT DENIED HIS RIGHT TO CONFRONT AND CROSS-EXAMINE A PROSECUTION WITNESS BY VIRTUE OF THE FACT THAT THE WITNESS HAD UNDERGONE HYPNOSIS PRIOR TO TRIAL?

In the instant case, one prosecution witness testified that she had been

hypnotized. However, she also stated that she had given a number of statements to the police prior to being hypnotized and that all the statements made at trial were made prior to the hypnotic session. Defense counsel was given the opportunity to cross-examine this witness about the tentativeness of her recollections and was given the opportunity (which she waived) to present expert testimony.

In People v Gonzales, 108 MichApp 145; 310 NW2d 306 (1981), Iv gtd 412 Mich 870 (1981), this Court held that hypnosis has not received sufficient scientific recognition of reliability to allow the post-hypnotic recollections of witnesses to be introduced into evidence. However, this conclusion does not mean that a witness who has been hypnotized will automatically be barred from testifying. Rather,

such a witness will still be allowed to testify as to those relevant facts remembered prior to undergoing hypnosis, provided certain standards surrounding the hypnosis are met. Gonzales, supra, 159, fn8. See also People v Wallach, 110 MichApp 37; 312 NW2d 387 (1981). In reaching this conclusion, the Wallach Court rejected the exclusion of all testimony by hypnotized witnesses on the basis that reliability and the credibility of the witnesses' testimony could be put in proper perspective through diligent cross-examination and through expert testimony as to the potential effect hypnosis might have on one's ability to recall events.

Gonzales was decided after the trial in the instant case. Therefore, the trial court did not have the benefit of

that decision. Furthermore, it is impossible from the record to determine whether the standards for admission of testimony by a hypnotized witness had been met.

Although Gonzales did not address this issue, we find that the standards set forth in Gonzales have only prospective effect. For trials which occurred prior to the release date of Gonzales, or within 20 days after that decision was released, we hold that testimony concerning pre-hypnotic recollection is admissible to the extent that the trial court is left with a belief that the witness's testimony actually was remembered prior to the hypnosis. Applying this standard to the instant case, we find that the trial court justifiably could have concluded that the witness's testimony was

limited to pre-hypnotic recollections.

In any case, even assuming arguendo that the complained-of testimony was incorrectly admitted, reversible error did not occur. Any error that did occur in the admission of the complained-of testimony was harmless in light of the overwhelming evidence against defendant.

IV

DID THE TRIAL COURT'S INSTRUCTIONS ON REASONABLE DOUBT CONSTITUTE REVERSIBLE ERROR?

Citing People v Davies, 34 MichApp 19; 190 NW2d 694 (1971), as well as other cases, defendant argues that the trial court erroneously instructed the jury on the issue of reasonable doubt. Defendant

further contends that this instruction shifted the burden of proof.

The error in Davies was charging the jury that a reasonable doubt could not be based upon a lack of evidence or upon the unsatisfactory nature of the evidence. People v Smalls, 61 MichApp 53; 232 NW2d 298 (1975), People v Ames, 60 MichApp 168; 230 NW2d 360 (1975). No such instruction was given in the instant case.

Reading the jury instructions as a whole we find that defendant's assignments of error are without merit.

V

MUST DEFENDANT'S CONVICTION FOR CONSPIRACY TO COMMIT SECOND-DEGREE MURDER BE SET ASIDE BE-

CAUSE THERE IS NO OFFENSE KNOWN IN LAW AS CONSPIRACY TO COMMIT SECOND-DEGREE MURDER?

Without objection, the jury was instructed, inter alia, that defendant could be found guilty of conspiracy to commit murder in the first degree (as was charged in the information) or conspiracy to commit murder in the second degree. On appeal, defendant argues that this instruction was erroneous in that there is no such crime as conspiracy to commit second-degree murder. The gist of defendant's argument on appeal is that the crime of conspiracy involves an agreement between two or more persons to accomplish some criminal act. Since it is the absence of premeditation and deliberation which distinguishes second-degree murder from first-degree murder, defendant

argues that it is impossible for a jury to find that defendant engaged in the premeditated commission of a crime which must be accomplished without premeditation.

We agree with defendant's conclusion, and, while we generally will not address error purported upon instructions to which no objections were raised, we will consider this issue in order to prevent the occurence of manifest injustice. See People v Lytal, 96 MichApp 140, 163; 292 NW2d 498 (1980), Iv gtd 409 Mich 923 (1980).

Generally speaking, a criminal conspiracy is a mutual understanding or agreement between two or more persons, express or implied, to do or accomplish some criminal or unlawful act. People v

Atley, 392 Mich 298, 311; 220 NW2d 465 (1974). The requisite elements of the crime of conspiracy are met when the parties enter into the mutual agreement; no overt acts must be established. People v Scotts, 80 MichApp 1, 14; 263 NW2d 272 (1977). As a crime, conspiracy is separate and distinct from the substantive offense. People v Carter, 94 MichApp 501, 504-505; 290 NW2d 46 (1979). The statute on the crime of conspiracy punishes the "planning" of the substantive offense; the statute on the substantive offense punishes the actual commission of the crime. People v Hamp, 110 MichApp 92; 312 NW2d 175 (1981). Thus, in order to prove conspiracy to commit murder it is not necessary to prove that a murder actually occurred. However, it must be established that the conspirators had the specific intent to commit murder. People

v Boose, 109 MichApp 455, 470; 311 NW2d 390 (1981).

It is the separate nature of the crime of conspiracy from the substantive offense which recently led this Court in Hamp, supra, 103, to conclude the crime of conspiracy to commit second-degree murder is not a necessarily included lesser offense of the crime of conspiracy to commit first-degree murder. In reaching this conclusion the Court reasoned:

> "Since prior 'planning' and 'agreement' are necessary, mandatory requisite elements of the crime of conspiracy, we find it analytically consistent to 'plan' to commit first-degree murder but logically inconsistent to 'plan' to commit second-degree murder. To prove a

conspiracy to commit murder, it must be established that each of the conspirators have the intent required for murder and, to establish that intent, there must be foreknowledge of that intent. Foreknowledge and plan are compatible with the sutstantive crime of first-degree murder as both the crime of conspiracy and the crime of first-degree murder share elements of deliberation and premeditation. Prior planning denotes premeditation and deliberation. The elements of conspiracy, conversely, are incompatible and inconsistent with second-degree murder. One does not 'plan' to commit an 'unplanned' substantive crime. It is not 'absence' of the elements but the 'inconsistency' of

the elements which lead us to conclude that one conspires to commit first-degree murder but not second--degree murder."

Although Hamp did not specifically hold that the crime of conspiracy to commit second-degree murder is nonexistent, the rationale of that opinion leads us to such a conclusion. As did the panel in Hamp, we find the elements of conspiracy to be incompatible with the elements of second-degree murder. One does not plan to commit an unplanned substantive offense.

Approaching the issue from a somewhat different perspective, we also conclude that an agreement to assault could never be elevated to conspiracy to commit second-degree murder--even where the

assault does, in fact, result in the death of the victim. Where there is an agreement to assault, the conspiracy would be complete before any overt act occurred. If the assault resulted in an "unplanned" death, the conspirators could be found guilty of conspiracy to assault and of the substantive crime of second-degree murder where the requisite malice arose from the assault and the resultant death. This result is consistent with the following illustration:

> "[T]he fact that conspiracy requires an intent to achieve a certain objective means that individuals who have together committed a certain crime have not necessarily participated in a conpsiracy to commit that crime. To take the example given by the Model Penal Code

> draftsmen, assume that two persons plan to destroy a building by detonating a bomb, though they know and believe that there are inhabitants in the building who will be killed by the explosion. If they do destroy the building and persons are killed, they are guilty of murder, but this is because murder may be committed other than with an intent-to-kill mental state. Their plan constitutes a conspiracy to destroy the building, but not a conspiracy to kill the inhabitants, for they did not intend the latter result." (Footnotes omitted.) LaFave & Scott, Handbook on Criminal Law (1972), pp 465-466.

In light of the above, defendant in the instant case could not have been

found guilty of conspiracy to commit second-degree murder. If the defendant had agreed with his coconspirators to murder, the completed conspiracy crime would have been conspiracy to commit murder in the first degree because of the planning and premeditation involved. On the other hand, if defendant had agreed with his coconspirators to assault his victim, and the conspirators did not intend for the victim to die, even though death did in fact result, the conspiracy crime would have involved some sort of assault offense which would have been completed before the victim's death occurred.[5]

---

[5] Where the particular facts of a case make it unclear as to the intent of the conspirators, we think a prosecutor would be justified in filing and bringing a defendant to trial under a multi-count information. See People v Jankowski, 408 Mich 79, 92-93; 289 NW2d 674 (1980). Thus, a conspirator might be charged with one count of conspiracy to commit some type of assaultive offense. It would then be for the jury to determine which, if any, offense had been committed.

For the foregoing reasons, defendant's conviction of conspiracy to commit second-degree murder is vacated. Defendant's conviction of second-degree murder is affirmed as is his sentence.

Affirmed in part; reversed in part.

Bronson, J., concurred.

J.H. Gillis, J. (concurring in part; dissenting in part.) I agree with parts I through IV of the majority opinion. However, as to part V I must dissent. The majority holds that defendant cannot be convicted of conspiracy to commit second-degree murder because conviction of such

crime would be in itself logically inconsistent.

Defendant was not charged with conspiracy to commit second-degree murder. He was charged with conspiracy to commit first-degree murder. The second-degree murder conspiracy instruction was given apparently in order to comply with People v Jenkins, 395 Mich 440; 236 NW2d 503 (1975). In Jenkins, the Michigan Supreme Court held that in every case in which first-degree murder is charged, the trial court must instruct the jury sua sponte, and even over objection, on second-degree murder.

In the case at bar no objection to the instruction was proffered by defendant. A verdict of guilty of conspiracy to commit second-degree murder was returned by the

jury.

Juries are not held to any rules of logic. The Michigan Supreme Court has held that juries are free to render verdicts which are inconsistent. People v Vaughn, 409 Mich 463; 295 NW2d 354 (1980). This rule preserves the jury's power to dispense mercy. Id., 466. In light of this rule, coupled with defendant's failure to object to the instruction, I would affirm the conviction.

STATE OF MICHIGAN

SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v No. 69615

ROBERT BERNARD JACKSON,

Defendant-Appellant.

BEFORE THE ENTIRE BENCH

M.F. CAVANAGH, J.

The common issue presented in these appeals is whether statements obtained after a defendant has requested appointment of counsel at arraignment are admissible pursuant to the principles enunciated in Edwards v Arizona, 451 US 477; 101 S Ct 1880; 68 L Ed 2d 378 (1981), and People v Paintman, 412 Mich 518; 315 NW2d 418 (1982), cert den 456 US 995; 102 S Ct 2280; 73 L Ed 2d 1292 (1982).

I

A

Defendant Bladel was convicted by a jury in July, 1979, of three counts of first-degree premeditated murder.[1] He was sentenced to three concurrent mandatory life sentences. Testimony at trial revealed that three railroad employees were shot to death on December 31, 1978, at the Amtrak station in Jackson, Michigan. Defendant, a disgruntled former railroad employee, was the prime suspect.[2] He was arrested on January 1, 1979, and questioned twice by Detective Gerald Rand on January 1 and 2. Defendant was properly advised of his Miranda[3] rights before each questioning and agreed both times to talk without an attorney. Defendant admitted being in and around the station on December 30 and 31, 1978, but denied any involvement in the kill-

ings. He was released on January 3.

On March 18, 1979, the shotgun used in the killings was found. The weapon had been purchased by defendant two years before the killings. The police also obtained strong scientific evidence linking him to the killings. Defendant was arrested in Elkhart, Indiana, on March 22, 1979. He waived extradition after being advised by a magistrate of his right to a full hearing and representation by counsel.

Defendant was driven back to Jackson the same afternoon. Detective Rand questioned him again that evening. Prior to questioning, defendant was properly advised of his rights, agreed to talk without counsel, and signed a waiver form. He did not confess to the killings.

Defendant was arraigned on Friday, March 23, 1979, in the presence of Detective Rand. Defendant requested that counsel be appointed for him because he was indigent. A notice of appointment was mailed to a law firm that day, but was not received until Tuesday, March 27, 1979. Defendant was not informed during the interim that counsel had been appointed, although he inquired several times.

On March 26, 1979, two police officers interviewed defendant in the county jail. Although the officers were working with Detective Rand on this case, they were not told that defendant had requested counsel. Prior to questioning, the defendant was again properly advised of his Miranda rights. When he informed the officers that he had requested counsel, they inquired whether he wished to have

an attorney present during questioning. Defendant agreed to proceed without counsel, signed a waiver form, and subsequently confessed to the killings.

Defendant challenged the admissibility of the confession and the three exculpatory statements at a pretrial Walker[4] hearing. The trial court ruled that all of the statements were admissible because defendant was properly advised of his rights and had knowingly and understandingly waived them each time.[5]

On appeal, defendant challenged only the admissibility of the confession. The Court of Appeals upheld the trial court's decision and affirmed the convictions.[6] People v Bladel, 106 Mich App 397; 308 NW2d 230 (1981). In lieu of granting leave to appeal, this Court remanded to

the Court of Appeals for reconsideration in light of People v Paintman and People v Conklin, 412 Mich 518; 315 NW2d 418 (1982). On remand, the Court of Appeals summarily concluded that Paintman and Conklin, when read in conjunction with this Court's remand order, "compelled" reversal. 118 Mich App 498; 325 NW2d 421 (1982). We granted the prosecutor's application for leave to appeal. 417 Mich 885; 330 NW2d 846 (1983).

B

Defendant Jackson was charged with first-degree murder, conspiracy to commit first-degree murder, [7] and possession of a firearm during the commission of a felony[8] in connection with the death of Rothbe Elwood Perry. He was convicted by a jury in February, 1980, of second-degree murder[9] and conspiracy to commit second-degree murder. He was sentenced

to two concurrent life terms.

Mr. Perry was shot and killed in his home in Livonia, Michigan, on July 12, 1979, during an apparent robbery. On July 28, 1979, Mildred Perry (the deceased's wife) and Charles (Chare) Knight were arrestred for the murder. Knight subsequently told Livonia police that Mildred Perry had solicited him to kill her husband. He, in turn, had contacted defendant. Knight maintained that defendant and another man had broken into the house and shot the deceased.

Defendant and Michael White were arrested on Monday, July 30, 1979, by Detroit police on an unrelated charge. They were turned over to the Livonia police at approximately 2 p.m. the following day. Defendant was questioned several times on

July 31 and gave three similar statements.10 Defendant admitted breaking into the house to kill Mr. Perry, but maintained that Knight had fired the shots.

On August 1, at approximately 10 a.m., defendant submitted to a polygraph examination after being advised of his Miranda rights. When defendant was informed that he had not passed, he told the examiner that he was the shooter and White had accompanied him. Defendant gave substantially similar oral and written statements shortly thereafter to Sergeant William Hoff, one of the officers in charge of the case.11

Defendant, White, Perry, and Knight were arraigned at 4:30 p.m. that afternoon. During arraignment, defendant re-

quested that counsel be appointed for him. Sergeants Hoff and Shirley Garrison were present when defendant requested counsel.

At 10:24 a.m. the next morning, defendant was readvised of his rights by Sergeants Garrison and Hoff and agreed to give another tape-recorded statement to "confirm" that he was the shooter. Defendant had not yet had an opportunity to consult with counsel. When asked whether he had been promised anything for his statement, defendant replied that nothing had been actually guaranteed, but something would be worked out.

Prior to trial, a lengthy Walker hearing was conducted. The trial court ruled that all of defendant's statments were admissible because he had been advised of

his Miranda rights before each statement was given, he never requested an attorney during the interrogations, he knowingly and voluntarily waived his rights each time, no improper promises or threats were made by the police, and the statements were not the result of any illegal delay in arraignment.12

In affirming defendant's conviction for second-degree murder,13 the Court of Appeals upheld the trial court's findings of fact. As to the post-arraignment statement, the court noted that the original panel in Bladel had found a knowledgeable and voluntary waiver of the right to counsel on almost identical facts. Edwards and Paintman were distinguished on the grounds that defendant asked for an attorney at arraignment, rather than during the police interroga-

tion. This request was "not made in such a way as to effectively exercise the right to preclude any subsequent interrogation" and was unrelated to defendant's Fifth Amendment right to counsel. 114 Mich App 649, 658-659; 319 NW2d 613 (1982). We granted defendant's application for leave to appeal. 417 Mich 885; 330 NW2d 846 (1983).

II

Defendants argue that their post-arraignment statements were obtained in violation of their Fifth and Sixth Amendment rights to counsel because they asked the arraigning magistrate for appointed counsesl. To determine whether these statements are admissible, the following questions must first be resolved:

1) What constitutional right(s) to counsel attached at the post-arraignment interrogations?

2) What right(s) to counsel did defendants invoke when they requested counsel at arraignment?

3) What right(s) to counsel did defendants purportedly waive prior to their post-arraignment interrogations?

A

The right to counsel is guaranteed by both the Fifth and Sixth Amendments to the United States Constitution, as well as Const 1963, art 1 § 17 and 20.14 However, these constitutional rights are distinct and not necessarily coextensive. See Rhode Island v Innis, 446 US 291, 300, fn 4; 100 S Ct 1682; 64 L Ed 2d 297 (1980).

In Miranda, the United States Supreme Court declared that an accused has a Fifth and Fourteenth Amendment right to have counsel present during custodial

interrogation in order to protect the accused Fith Amendment privilege against compulsory self-incrimination. Innis, supra, p 297; Edwards supra, 451 US 481. However, the Fifth Amendment right to counsel attaches only when an accused is in custody, United States v Henry, 447 US 264, 273 fn 11; 100 S Ct 2183; 64 L Ed 2d 115 (1980), and subjected to interrogation. Innis, supra, p 298; Kirby v Illinois, 406 US 682, 688; 92 S Ct 1877; 32 L Ed 2d 411 (1972). Once an accused invokes his right to have counsel present during custodial interrogation, the police must refrain from further interrogation until counsel is made available, unless the accused initiates further communications, exchanges, or conversations with the police. Edwards, supra, pp 484--485; Paintman, supra, 412 Mich 526. Neither Miranda nor its progeny limits

the Fifth Amendment right to counsel to custodial interrogations conducted prior to arraignment. Since defendants were clearly subjected to custodial interrogation when they made their post-arraignment confessions, their Fifth Amendment right to counsel had attached.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right....to have the Assistance of Counsel for his defense." However, this right to counsel attaches only at or after the initiation of adversary judicial proceedings against the accused by way of a formal charge, preliminary hearing, indictment, information, or arraignment. United States v Gouveia, ___ US ___, ___; 104 S Ct 2292; 81 L Ed 2d 146, 153-154 (1984); Kirby, supra, 406 US 688-689. The accused is

entitled to counsel not only at trial, but at all "critical stages" of the prosecution, i.e., those stages "where counsel's absence might derogate from the accused's right to a fair trial." United States v Wade, 388 US 218, 226-227; 87 S Ct 1926; 18 L Ed 2d 1149 (1967). Regardless of whether the accused is in custody or subjected to formal interrogation, the Sixth Amendment right to counsel exists whenever the police attempt to elicit incriminating statements. Henry, supra, 447 US 271-273. See also Brewer v Williams, 430 US 387; 97 S Ct 1232; 51 L Ed 2d 424 (1977); Messiah v United States, 377 US 201; 84 S Ct 1199; 12 L Ed 2d 246 (1964). This right to counsel does not depend upon a request by the accused and courts indulge in every reasonable presumption against waiver. Brewer, supra, pp 404-405. Since defendants were interrogated

subsequent to arraignment, they were also entitled to counsel under the Sixth Amendment.

B

The foregoing analysis demonstrates that defendants' request to the arraigning magistrate for appointment of counsel implicated only their Sixth Amendment right to counsel. Although defendants were in custody at the time of their arraignments, they were not subjected to interrogation. In addition, they did not specifically request counsel for any subsequent custodial interrogations which might be conducted. Defendants requested appointed counsel because they were financially incapable of retaining an attorney and were unwilling to represent themselves. See State v Sparklin, 296 Or 85; 672 P2d 1182, 1185-1186 (1983).

C

The trial courts found that defendants never invoked their Fifth Amendment right to counsel before or during their post-arraignment interrogations. Furthermore, defendants knowingly and voluntarily waived their Miranda rights prior to their statements. Our independent review of the record does not disclose that these findings are clearly erroneous. People v McGillen #1, 392 Mich 251, 257; 220 NW2d 677 (1974); People v Robinson, 386 Mich 551, 557; 194 NW2d 709 (1972).

III

The question remains whether defendants' waiver of their Fifth Amendment right to counsel also waived their Sixth Amendment right to counsel. Defendants were given standard Miranda warnings prior to their post-arraignment interrogations. However, these warnings were

designed to advise an accused only of his Fifth Amendment rights. The Sixth Amendment right to counsel is considerably broader than its Fifth Amendment counterpart since it applies to all critical stages of the prosecution. Neither the United States Supreme Court nor this Court has delineated specific procedural requirements for waiver of the Sixth Amendment right to counsel.[15]

A

Courts which have specifically addressed the problem of requests for counsel at arraignment have reached differing results both before and after Edwards was decided. The Second Circuit Court of Appeals has adopted the strictest procedural requirements for waiver of the Sixth Amendment right to counsel. In United States v Satterfield, 558 F2d 655, 657 (CA 2, 1976), defendant's post-indictment

and post-arraignment statements were suppressed, even though he had executed a written waiver of his Miranda rights. The Court reasoned that even if the statements were voluntary for purposes of the Fifth Amendment "they were involuntary with 'regard....[to] the higher standard with respect to waiver of the right to counsel that applies when the Sixth Amendment was attached.'"

Specific procedural safeguards were adopted in United States v Mohabir, 624 F2d 1140 (CA 2, 1980).[16] The Mohabir Court explained that a higher standard for waiver of counsel is required after judicial proceedings have commenced because the government has committed itself to prosecute, and any questioning by the government can only be for the purpose of buttressing its prima facie case. Informing a defendant of his Miranda rights and the fact that he has been indicted is insufficient, since this information may not allow the accused to "'appreciate the gravity of his legal position, and, the urgency of his need for a lawyer's assistance.'" Id., pp 1148-1150. In the exercise of its supervisory power, the Mohabir Court held that an accused may not validly waive his Sixth Amendment right to counsel unless a federal judicial officer has explained the content and significance of this right.[17] Furthermore, the accused must be shown the indictment and informed of its significance, the right to counsel, and the seriousness of his situation should he decide to answer further police questions without counsel. The Court believed that this procedure would minimize disputes as to what warnings were actually given and

whether defendant fully comprehended his rights. Id., p 1153.

The Fifth Circuit, on the other hand, has reached conflicting results, primarily because it has not adequately distinguished the Fifth and Sixth Amendment rights to counsel. In Blasingame v Estelle, 604 F2d 893, 895-896 (CA 5, 1979), the Court stated that the crucial inquiry is whether defendant's assertion of his right to counsel before the arraigning magistrate was made in such a manner that the subsequent police questioning "impinged on the exercise or the suspect's continuing option to cut off the interview." It was noted that some defendants may wish to have an attorney represent them in legal proceedings, yet wish to assist the police by responding to questions without an attorney being

present. The Court found that Blasingame's request was not an invocation of his Fifth Amendment right to confer with or have counsel present during questioning. Since he was informed of his Miranda rights at arraignment and before his subsequent interrogation, and had voluntarily and intelligently waived these rights, his post-arraignment statements were admissible.[18] Blasingame, however, was decided solely on Fifth Amendment grounds.

A contrary result was reached in Silva v Estelle, 672 F2d 457 (CA 5, 1982). There, defendant was questioned one hour after he asked the arraigning magistrate for permission to call his attorney. This request was construed as an unequivocal exercise of defendant's right to counsel. The Silva Court concluded that under

Edwards, the police were not entitled to initiate further interrogation unless they first honored defendant's request for counsel. Like Blasingame, Silva did not distinguish between defendant's Fifth and Sixth Amendment rights to counsel.

Shortly after Silva was decided, Jordan v Watkins, 681 F2d 1067, 1073-1075 (CA 5, 1982), held that the police, who were not aware that counsel had been appointed at arraignment, properly interrogated the defendant. Edwards was distinguished on the grounds that Jordan had never requested counsel with respect to custodial interrogation or attempted to cut off questioning; he merely wanted counsel to assist him in further judicial proceedings. (The Jordan Court relied heavily upon Blasingame in reaching this conclusion, but did not mention Silva.)

After examining the totality of the circumstances, the Court found that Jordan had voluntarily, knowingly, and intelligently waived both his Fifth and Sixth Amendment rights to counsel.

In contrast, the Sixth Circuit held, in United States v Campbell, 721 F2d 578, 579 (CA 6, 1983), that incriminating statements obtained thirteen minutes after defendant requested and was appointed counsel were inadmissible. The Court noted that the interrogating agents had manifested an indifference to, if not an intentional disregard for, defendant's Sixth Amendment right to counsel and Fifth Amendment right against compulsory self-incrimination, primarily because they were present when defendant requested counsel. The agents improperly conducted "one last round of interrogation"

before defendant had an opportunity to consult with counsel. Such conduct clearly violated Edwards. Jordan was distinguished because Campbell had not voluntarily, knowingly, and intelligently waived his Fifth Amendment right to counsel by initiating the post-arraignment conversation.

Several state supreme courts have addressed this problem, but have also reached conflicting results. In Johnson v Commonwealth, 220 Va 146, 158-159; 255 SE2d 525 (1979), later app 221 Va 736; 273 SE2d 784 (1981), cert den 454 US 920; 102 S Ct 422; 70 L Ed 2d 231 91981), the police initiated interrogation five hours after defendant requested counsel at arraignment. The Virginia Supreme Court held that defendant's confession was admissible because he had knowingly, intel-

ligently, and voluntarily waived his right to counsel prior to interrogation. The Court found that the police officers' conduct was not coercive, they were not aware that defendant had been arraigned, and defendant had never requested counsel during the interrogation. However, the Johnson Court did not distinguish between defendant's Fifth and Sixth Amendment rights to counsel. Furthermore, the case was decided prior to Edwards.

The United States Supreme Court ultimately denied defendant's petition for certiorari, over a lengthy dissent written by Justice Marshall. He believed that the decision to admit the confession was contrary to the spirit, if not the letter, of Edwards. He rejected the state's attempt to distinguish Edwards:

"The State attempts to distinguish Edwards on two grounds. First, it points out that Edwards clearly expressed his desire to deal with police only through counsel, whereas petitioner here simply asked that an attorney be appointed. However, an accused is under no obligation to state precisely why he wants a lawyer. If we were to distinguish cases based on the wording of an accused's request, the value of the right to counsel would be substantially diminishd. As we stated in Fare v Michael C., 442 US 707, 719 [99 S Ct 2560; 61 L Ed 2d 197] (1979), 'an accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease.'

"Second, the State notes that Edwards informed the police of his desire for an attorney, whereas petitioner only informed the judge at his arraignment. The State suggests that since the police did not know about petitioner's request, the interrogation was not improper. However, the police could easily have determined whether petitioner had already exercised his right to counsel; presumably, a prosecutor was present at the arraignment. They did not know about petitioner's request for a lawyer only because they made no effort to determine whether such a request had been made. But even if the police could not have discovered that petitioner had expressed a desire for an attorney, I would hold that

the confession should not have been admitted. The key question in this case is whether petitioner's waiver of his right to counsel was knowing, intelligent, and voluntary. In determining whether these conditions were satisfied, the fact that the police were unaware of a prior request for counsel is only tangentialy relevant. What is important, rather, is the state of mind of the accused. I think it is no more safe to assume that a waiver is valid when an accused has made a prior request to the judge at his arraignment than when he has made the request to police. In both cases, the accused informs an individual in authority that he would like an attorney--and yet shortly thereafter, state officials, apparently

disregarding his request, ask him to waive his rights." 454 US 922-923.

In State v Sparklin, 296 Or 85; 672 P2d 1182 (1983), the Oregon Supreme Court carefully differentiated between the two constitutional rights to counsel. There, defendant requested an attorney at his arraignment on a forgery charge stemming from the use of a stolen credit card. That evening, the police interrogated him concerning an assault on the credit card owner and a factually unrelated murder and robbery. Defendant waived his Miranda rights and confessed to the murder.

The Sparklin Court initially found that defendant had not invoked either his state or Fifth Amendment right to counsel or privilege against compulsory self-

incrimination during arraignment. Unlike an interrogation session, a defendant is not confronted with an atmosphere of coercion or attempts to gain admissions during arraignments. Without a more explicit request or one made in anticipation of, or during, interrogation, defendant's request for an attorney was deemed to be merely "a matter of routine." Id., pp 1185-1186.

Turning to the Sixth Amendment right to counsel and its state counterpart, the Sparklin Court noted that pursuant to its earlier interpretations of the Oregon Constitution, the state was required to notify the defendant's attorney prior to interrogation and afford him an opportunity to be present. Furthermore, the defendant could not waive his state constitutional right to counsel until he had

consulted with his attorney, although he could volunteer statements on his own initiative. Id., p 1187. Although the comparable Sixth Amendment right to counsel was not so clearly defined, the court believed that it was of equal scope. Id., p 1188. In dicta, the Court noted that if defendant had been questioned for the crimes against the credit card owner, the interrogation would have been improper since no waiver could have been given before counsel was consulted. Id., p 1190.19

The most recent decision is State v Wyer, 320 SE2d 92 (W Va, 1984). After reviewing numerous cases, the West Virginia Supreme Court concluded that there is no rule per se against waiver of the Sixth Amendment right to counsel. However, it believed that such a waiver should be

judged by stricter standards than a waiver of the Fifth Amendment right to counsel. The Wyer Court refused to equate a general request for counsel at arraignment with an Edwards direct request for counsel to an interrogating officer, since the Sixth Amendment right attaches regardless of whether a specific request is made. Thus, the police could initiate questioning after a defendant requests counsel at arraignment, as long as the defendant is willing to waive his Sixth Amendment right.

In order to ensure a valid waiver of the Sixth Amendment right to counsel, the Wyer Court held that a defendant must execute a written waiver after being informed of his arrest, the nature of the charges against him, and his Miranda rights. If the defendant asserts his

Edwards right to counsel when the waiver is sought, interrogation must cease until counsel is made availale, unless the defendant initiates further communications with the intent to waive his Sixth Amendment right to counsel. The interrogating officer's knowledge that counsel has been requested was deemed to be only "one ingredient" in determining whether the waiver was valid, rather than an absolute bar. Id., p 105 and fns 23 & 25.

The Wyer dissent persuasively argued that if a Miranda waiver is inadequate to protect the Fifth Amendment right to counsel under Edwards, it certainly would be inadequate to protect the greater Sixth Amendment right. The dissent believed that once a defendant makes an oral or written request for counsel to the magistrate, the police must notify his

lawyer and refrain from further interrogation until the defendant has spoken to him. If, after consultation, the defendant wishes to forego his right to counsel, he can then do so. The officer's presence at arraignment was deemed an irrelevant consideration, since both he and the prosecutor have a duty to discover whether the defendant has been arraigned and if he requested counsel. Such safeguards would not prevent confessions, but only guarantee that they were voluntary and obtained without violating the defendant's right to counsel. The dissent concluded:

> "[I]t is time to recognize that all defendants without counsel are constitutionally disadvantaged when faced with a government armory of

> armed police, prosecutors and professional interrogators." Id., p 111.

B

As the foregoing discussion demonstrates, no consistent approach to the waiver problem has emerged. However, it is clear that no court has adopted a per se rule which prevents a defendant from ever waiving his Sixth Amendment right to counsel.20 We also decline to adopt such a rule.

It is also clear that if defendants had invoked their Fifth Amendment right to counsel to the police, Edwards and Paintman would have barred all further interrogation until defendants had an opportunity to consult with counsel, since they did not reinitiate further

conversations with the police. The United States Supreme Court adopted this prophylactic rule to protect an accused from being badgered by the police while in custody. Oregon v Bradshaw, 462 US 1039, ; 103 S Ct 2830; 77 L Ed 2d 405, 411 (1983).

Although judges and lawyers may understand and appreciate the subtle distinctions between the Fifth and Sixth Amendment rights to counsel, the average person does not. When an accused requests an attorney, either before a police officer or a magistrate, he does not know which constitutional right he is invoking; he therefore should not be expected to articulate exactly why or for what purposes he is seeking counsel. It makes little sense to afford relief from further interrogation to a defendant who

asks a police officer for an attorney, but permit further interrogation of a defendant who makes an identical request to a judge. The simple fact that defendant has requested an attorney indictes that he does not believe that he is sufficiently capable of dealing with his adversaries singlehandedly. As Justice Marshall noted, if we are to distinguish cases solely on the wording of an accused's request and to whom it is made, the value of the right to counsel would be substantially diminished.

Furthermore, once adversary judicial proceedings have commenced, the police have "everything to gain" and the accused "everything to lose" when "one last round" of interrogation is conducted before counsel arrives:

"As Justice Stewart noted in Kirby v Illinois, supra, 406 US at 689-690:

> "'The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is

> this point, therefore, that marks the commencement of the "criminal prosecutions" to which alone the explicit guarantees of the Sixth Amendment are applicable.' * * * *

"The indictment thus marks a crucial point for the defendant; it also marks the point after which any questioning of the defendant by the government can only be 'for the purpose of buttressing. . .a prima facie case. . .[S]ince the finding of the indictment presumably imports that the People have legally sufficient evidence of the defendant's guilt of the crime charged. . ., the necessities of appropriate police investigation "to solve a crime, or even to absolve a sus-

pect" cannot be urged as justification for any subsequent questioning of the defendant.'

* * *

"[A]s Judge Knapp pointed out in United States v Satterfield, 417 F Supp 293, 296 (SDNY), aff'd, 558 F2d 655 (CA 2, 1976):

"'Prior to indictment--before the prosecution has taken shape --there may be reasons why a suspect might rationally wish to deal with agents without the intervention of counsel. By getting in their good graces and being useful to the government he might be able altogether to avoid indictment or any legal entanglement. No such opportunity is open to him af-

ter a grand jury has spoken. At that point he cannot make any arrangement with agents or prosecutor that is not subject to ultimate approval by the court, and counsel is obviously important to advise him on what terms such approval is likely to be forthcoming and how best to obtain it.'" Mohabir, supra, 624 F2d 1148-1149.21

Finally, it is clear that every court has acknowledged that the Sixth Amendment right to counsel is as important, if not more so, than the judicially created Fifth Amendment right to counsel. As such, it is entitled to be protected by procedural safeguards at least as stringent as those designed for its lesser counterpart. We decline to follow the

reasoning of those cases which have found valid Sixth Amendment waivers after a request for counsel has been made to a magistrate based solely on waivers of Miranda rights. The majority of these cases did not sufficiently distinguish between the concerns underlying the Fifth and Sixth Amendment rights to counsel. As the Wyer dissent noted, if a Miranda waiver is insufficient to ensure a valid waiver of the Fifth Amendment right to counsel pursuant to Edwards, it certainly should be inadequate to ensure a valid waiver of the greater Sixth Amendment right.

C

We need not decide at this time whether stricter procedural standards for waiver of the Sixth Amendment right to counsel are required. We need only hold that, at a minimum, the Edwards/Paintman

rule applies by analogy to those situations where an accused requests counsel before the arraigning magistrate.[22] Once this request occurs, the police may not conduct further interrogations until counsel has been made available to the accused, unless the accused initiates further communications, exchanges, or conversations with the police.[23] If a defendant chooses to reinitiate communications, he must be sufficiently aware of both his Fifth and Sixth Amendment rights to effectuate a voluntary, knowing, and intelligent waiver of each right. See Bradshaw, supra, ___ US ___; 77 L Ed 2d 413; Johnson v Zerbst, 304 US 458, 464; 58 S Ct 1019; 82 L Ed 1461 (1938).

We further hold that before commencing interrogation, the police have an obligation to determine whether an accused

has been arraigned and requested counsel. This duty is no more onerous than that imposed by Edwards and Paintman. As Justice Willams observed in his dissent in People v Esters, 417 Mich 34, 64; 331 NW2d 211 (1982):

> "[T]he defendant's rights may not be diminished merely because the state fails to respond to defendant's request for counsel, as it should have done. Once he has asked for counsel, the defendant has done all that is within his power to secure this guaranteed right."

We also note that the police officers who were in charge of the investigations in both Bladel and Jackson were present at the arraignments when defendants requested appointed counsel. Although the

officers who later interrogated Bladel were not present at arraignment, Bladel informed them of his request prior to questioning. In both cases, the police were attempting to strengthen their cases by conducting "one last round" of interrogation before counsel arrived. Interrogations of defendants who are represented by counsel without counsel's knowledge have been repeatedly criticized. See, e.g., United States v Campbell, 721 F2d 578, 579 (CA 6, 1983); United States v Cobbs, 481 F2d 196, 200 (CA 3, 1973), cert den 414 US 980; 94 S Ct 298; 38 L Ed 2d 224 (1973); United States v Springer, 460 F2d 1344, 1353 (CA 7, 1972), cert den 409 US 873; 93 S Ct 205; 34 L Ed 2d 125 (1972); Paintman, supra, 412 Mich 529-530.

The Police cannot simply ignore a

defendant's unequivocal request for counsel. As this Court noted in Paintman, supra:

> "Of what significance is invocation of a cherished constitutional right if it is ignored by the hearer and, in fact, only seems to exacerbate the defendant's plight? As the time gap increases between the embracing of the right and its fulfillment, the certainty of its existence must surely dim."

In fact, defendant Bladel specifically testified that he began to doubt whether he would have counsel appointed because he did not meet with an attorney until three days after his arraignment. Furthermore, when he asked the jail personnel and the interrogating officers

whether counsel had been appointed for him, they repetedly pleaded ignorance.

Since def dants Bladel and Jackson requested counsel during their arraignments, but were not afforded an opportunity to consult with counsel before the police initiated further interrogations, their post-arraignment confessions were improperly obtained and must be suppressed. Plaintiffs nevertheless maintain that defendants' statements need not be suppressed because they were tried before Edwards was decided. In Solem v Stumes, US ___, ___; 104 S Ct 1338; 79 L Ed 2d 579, 592 (1984), the Supreme Court refused to apply Edwards retroactively to collateral reviews of final convictions. The Court, however, specifically declined to decide whether Edwards could be applied retroactively to defendants whose

convictions were not yet final when the decision was issued.

We need not decide this question since a violation of the Fifth Amendment right to counsel is not involved in either of these cases. We have merely extended the Edwards/Paintman rule by analogy to cases involving requests for counsel during arraignment, on the basis of our interpretation of both the Sixth Amendment right to counsel and its state constitutional counterpart embodied in Const 1963, art a § 20. Given the Supreme Court's holding that Edwards established a new "bright line" test,[24] the fact that this Court has not previously articulated precise procedural standards for waivers of the Sixth Amendment right to counsel, and the diverse approaches adopted in other jurisdictions, the rules

articulated herein will apply to the instant cases, those cases tried after this opinion is issued, and those cases pending on appeal which have raised the issue.

IV

Defendant Jackson further argues that his six pre-arraignment confessions were inadmissible because the police deliberately delayed arraignment in order to obtain them or the confessions were induced by police threats and promises. The trial court rejected both arguments. The Court of Appeals agreed that the pre-arraignment delay was not used to extract a confession. Defendant was properly advised of his Miranda rights before each session and, according to the police officers, he volunteered his statements. 114 Mich App 654-655.[25]

A

Although the police had sufficient probable cause to obtain a warrant for defendant Jackson's arrest as a result of codefendant Knight's statements, they did not do so. Defendant was "arrested" on the murder charges on Tuesday, July 31, at 2 p.m. when he was turned over to the Livonia police. Since defendant was arrested for a felony without a warrant, the arresting officers were required to bring him before a magistrate for arraignment without unnecessary delay. MCL 764.13; MSA 28.871(1); MCL 764.26; MSA 28.885; People v Mallory, ___ Mich ___; ___ NW2d ___ (1984) (slip op, p 5); People v White, 392 Mich 404, 424; 221 NW2d 357 (1974), cert den sub nom Michigan v White, 420 US 912; 95 S Ct 835; 42 L Ed 2d 843 (1975). Immediate arraignment is not required, however.

Circumstances may require a brief delay for "booking," a quick verification of the accused's volunteered "story," or a brief questioning to determine the immediate question of release or complaint. Mallory v United States, 354 US 449, 454-455; 77 S Ct 1356; 1 L Ed 2d 1479 (1957); People v Hamilton, 359 Mich 410, 416-417; 102 NW2d 738 (1960). Even when an unnecessary delay has occurred, admissions or confessions obtained during this period will not be excluded unless the delay was enemployed as a tool to extract the statement. Mallory, supra, ___ Mich (slip op, p 5); White, supra.

Defendant was not arraigned until August 1 at 4:30 p.m., approximately 26 1/2 hours after his arrest. He was first interrogated shortly after arriving at the Livonia police station. The police ini-

tially obtained background information from defendant and informed him of his rights, the nature of the charges against him, and the mandatory punishment of life imprisonment for first-degree murder. They then confronted him with Knight's statement that defendant and another person had committed the murder. At approximately 3:30 p.m., defendant admitted that he was present during the murder, but maintained that Knight was with him and had shot the victim.

We conclude that this first oral statement was not obtained during a period of unreasonable delay. The officers' questioning occurred 1 1/2 hours after the arrest and was for the purpose of determining whether Knight had unjustly accused defendant.

Sergeant Richard Ericson, another officer in charge of the case, testified at the Walker hearing that after this first confession, the police had sufficient information to obtain an arrest warrant against defendant. Sergeant Hoff testified similarly, but explained that they could not have obtained a warrant because the prosecutor's office was closed and there was no one available to authorize the warrant request. Shortly after the first statement was given, the police asked defendant to repeat his statement so that it could be tape-recorded. Defendant agreed. The recording began at 5:52 p.m. However, the quality of the recording was so poor that the police asked defendant to repeat the statement again. The second taping began at 8:48 p.m. The content of these two recorded statements

did not substantially differ from that of the prior oral statement.

Giving the police the benefit of the doubt, we conclude that no unreasonable delay occurred between the arrest and the time these two taped statements were given. If any unreasonable delay occurred, it was not used to extract a new statement, but merely to memorialize the first oral statement.[26]

After the second taped statement, defendant was confronted by the fact that his version still differed from Knight's, i.e., defendant claimed that he and Knight were present but that Knight was the shooter, while Knight claimed that defendant and White committed the murder. The police noted that Knight had agreed to undergo a polygraph examination the

following morning and requested that defendant undergo one also. Defendant agreed.

The examination began at approximately 10 a.m. The polygraph examiner informed defendant of his rights and that he did not have to submit to the exam. Defendant still agreed to the polygraph. Afterwards, the examiner informed defendant that he had not been truthful and urged him to tell the other officers the truth in order to maintain his credibility. Defendant then confessed to the examiner that he had shot the victim and that White, not Knight, had been present. The examiner immediately informed Sergeant Hoff, who was waiting outside the polygraph room. Shortly thereafter, Sergeant Hoff met with defendant, advised him of his rights, and obtained substantially

similar oral and written statements.

Primarily on the basis of the officers' testimony at the Walker hearing, we conclude that the three post-polygraph statements were obtained during an unnecessary pre-arraignment delay and that the delay was employed as a tool to extract these statements. Sergeant Hoff testified that if an arrest warrant had been issued during the morning of August 1, defendant could have been arraigned at the time, except for the polygraph exam. Sergeant Ericson testified that he began preparing the 36-page warrant request for all four defendants at 9:30 a.m. on August 1, and finished at 1 p.m. On cross-examination, however, he stated that he had previously prepared a request and obtained a warrant for codefendant Perry. The warrant requests for Perry and defendant were

substantialy similar, except for the information concerning Knight's statements, and defendant's pre- and post-polygraph confessions. Sergeant Ericson thereafter presented the request to the prosecutor's office, obtained the complaints and warrants, and arrived at the Livonia District Court at approximately 4:30 p.m. for the arraignment.

Although the thoroughness with which the warrant request was prepared may be commendable, the police cannot justify infringing upon a defendant's statutory and constitutional rights to a prompt arraignment merely on the grounds that their "paperwork" has not yet been completed. A contrary conclusion would encourage dilatory efforts in seeking and obtaining the prosecutor's authorization. It must be remembered that a magistrate

is required to issue an arrest warrant upon presentation of a proper complaint alleging the commission of an offense and upon a finding of reasonable cause to believe that the accused committed the offense. MCL 764 1a; MSA 28.860(1). The complaint need not contain every fact which contributed to the affiant's conclusions, nor must every factual allegation be independently documented. The complaint simply has to be sufficient enough to enable the magistrate to determine that the charges are not capricious and are sufficiently supported to justify further criminal action. Jaben v United States, 381 US 214, 224-225; 85 S Ct 1365; 14 L Ed 2d 345 (1965); United States v Fachini, 466 F2d 53, 56 (CA 6, 1972). In addition, a complaint may thereafter be amended if additional evidence so requires. The police and the

prosecutor here had sufficient evidence to draft a complaint and obtain a warrant before or shortly after defendant was arrested. There was no need, for purposes of arraignment, to determine whether Knight or defendant was telling the truth.

The delay was used as a tool to extract the three post-polygraph statements. Sergeants Ericson, Hoff, and Garrison all testified that they asked defendant to submit to a polygraph so that they could determine whether he was telling the truth. Although they did not specifically instruct the examiner to obtain a statement, Sergeant Hoff testified that they had hoped to obtain another statement if defendant's original confession proved inaccurate. The police were obviously attempting to strengthen their

case against all four defendant's, particularly White, who had not yet confessed to any involvement. The three post-polygraph confessions therefore were not admissible.[27]

B

After reviewing the record, we conclude that the trial court did not clearly err in finding that defendant's three pre-polygraph confessions were not improperly induced by threats or promises.[28] In light of our prior conclusion that the post-polygraph confessions are inadmissible, we need not determine whether they were the product of threats or promises. Although defendant's three pre-polygraph confessions implicated him in the murder at least as an aider and abettor, a new trial is required. Defendant testified before the jury that he did not make the first oral statement and

that the two taped confessions were induced by police threats and promises. The cumulative effect of admitting seven confessions, as opposed to three, may have made a difference in the jury's determination of credibility.

V

The decision of the Court of Appeals is affirmed in Bladel and reversed in Jackson. These cases are remanded to the trial court for further proceedings consistent with this opinion.

/s/ Michael F. Cavanagh

/s/ G. Mennen Williams

/s/ Charles Levin

/s/ Thomas G. Kavanagh

1

MCL 750.316; MSA 28.548.

2

The evidence against defendant was substantial. Shortly before he died, one of the victims indicated that the assailant was a white male. A ticket clerk observed a tall, husky person walking away from the station after the shootings, carrying a soft-sided suitcase. A passerby similarly testified that he observed a stocky man wearing a jacket and cap walking away from the station carrying a case. He entered a nearby hotel. Defendant had rented a room at that hotel on December 30 and 31, 1978.

When defendant was arrested on January 1, 1979, he was wearing a blue nylon jacket and cap and was carrying a brown soft-sided suitcase, which contained a

can of gun oil. Defendant first claimed that he had been nowhere near the station, but later stated that he had used the restrooms there twice. He claimed to have recently arrived in Jackson to look for a job, even though it was a holiday weekend.

A 12-guage shotgun and duck jacket were found in mid-March 1979. Ballistics evidence disclosed that a spent shotgun shell found at the scene of the killings came from the shotgun. The weapon had been purchased by defendant in Elkhart, Indiana, two years before the killings. Fibers found on the gun and the duck jacket and in defendant's suitcase were identical. A speck of human blood was also found on the cap defendant was wearing when he was first arrested.

3

Miranda v Arizona, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

4

People v Walker (On Rehearing), 374 Mich 331; 132 NW2d 87 (1964).

5

The court acknowledged that the lack of opportunity to consult with counsel before interrogation does affect the voluntariness and effectiveness of a waiver. However, it knew of no case which required suppression under these circumstances.

6

The Court of Appeals rejected defendant's assertion that interrogation can never occur once a defendant requests counsel. The court acknowledged that the prosecutor bore a heavy burden in proving a knowledgeable and voluntary waiver and

that the police may have acted unethically in obtaining the confession. Nevertheless, the waiver was valid because defendant had been warned by the Indiana magistrate not to talk to police until he met with counsel, he had prior contact with the criminal justice system and understood his rights, he had signed a waiver form, and had not reasserted his right to counsel during the interrogation. Finally, the four-day delay between arraignment and the first meeting with counsel was not unreasonable. There was no evidence that defendant was kept from his attorney in order to obtain a confession.

7

MCL 750.157a; MSA 28.354(1) and MCL 750.316; MSA 28.548.

8

MCL 750.227b; MSA 28.424(2).

9

MCL 750.317; MSA 28.549.

10

Defendant's first oral statement was given at 3:30 p.m. A similar statement was tape recorded at 5:52 p.m., but was retaped at 8:48 p.m. because of the poor quality of the prior recording. Defendant maintained that he was not advised of his Miranda rights until shortly before the first taping and that he had requested an attorney during the first interrogation. He agreed to confess because the police suggested that he might be able to plead to less than first-degree murder. He was also afraid that he would be beaten.

In contrast, several police officers testified that defendant was advised of his rights as he was being transported from Detroit to Livonia and before each

statement was given. They denied that defendant had ever requested an attorney. They also denied promising him a "deal" or threatening him. The trial court found the police officers' testimony to be more credible.

11

Subsequent to these statements, the police reinterrogated Michael White, who had repeatedly denied any involvement. Defendant was brought into the interrogation room to persuade White to confess. This interrogation session was tape recorded. White subsequently confessed to the murder after arraignment.

12

However, White's confession was suppressed as being coerced. Primarily on the basis of the recorded interrogation session of August 1, the trial court found that the police had ignored White's

requests for counsel and improperly offered plea bargains.

13

The Court of Appeals vacated defendant's conviction and sentence for conspiracy to commit second-degree murder because the crime could not logically exist. The court reasoned that defendant could not have conspired to commit a criminal act which by definition is committed without premeditation and deliberation. The prosecutor has not challenged this ruling on appeal to this Court.

14

Const 1963, art 1, § 17 provides in relevant part:

> "No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without

> due process of law."

Const 1963, art 1, § 20 provides in relevant part:

> "In every criminal prosecution, the accused shall have the right... to have the assistance of counsel for his defense..."

15

Although Edwards arguably involved a statement obtained after judicial criminal proceedings had commenced, the Supreme Court specifically declined to address the Sixth Amendment question because the state court had not done so. Edwards, supra, 451 US 480, fn 7. Similarly, in Conklin (the companion case to Paintman), a confession was obtained seven days after the defendant requested counsel during his arraignment. See

Paintman, supra, 412 Mich 526. This Court did not discuss the Sixth Amendment ramifications of this request since Paintman and Conklin had also invoked their Fifth Amendment right to counsesl prior to arraignment.

Numerous courts have attempted to define what procedural requirements are sufficient to ensure that a defendant's waiver of his Sixth Amendment right to counsel is voluntary, knowing and intelligent. See cases cited in People v Green, (Levin, J., dissenting), 405 Mich 273, 302-304, and fns 5-8; 274 NW2d 448 (1979), and Note, Proposed Requirements for Waiver of the Sixth Amendment Right to Counsel, 82 Colum L R 363, 369 fn 42 (1982). Some courts have held that a valid waiver of Miranda rights alone is sufficient, while other courts require

that the defendant be specifically informed of his Sixth Amendment rights by the police or a neutral magistrate. Some cases apparently have turned on the particular facts presented, e.g., whether the defendant or the police initiated the conversation which resulted in the confession, or whether the police were aware that defendant had been arraigned, had requested counsel, or had obtained counsel by the time the interrogation was conducted. Id.

Recent law review articles generally advocate that higher standards be implemented to safeguard the Sixth Amendment right to counsel. See, e.g., 82 Colum L R, supra, p 381 (defense counsel should be present when defendant waives his right to counsel); Note, Sixth Amendment Right to Counsel: Standards for Knowing

and Intelligent Pretrial Waivers, 60 Boston U L R 738, 762-764 (1980) (in addition to Miranda warnings, defendant must be told that he has been formally charged, the significance thereof, and how an attorney could assist him); Grano, Rhode Island v Innis: A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions, 17 Am Crim L R 1, 35 (1979) (police cannot elicit information from defendant unless they seek to notify counsel; if no attorney exists, defendant's waiver must meet the standards that govern waiver of the right to counsel at trial pursuant to Faretta v California, 422 US 806; 95 S Ct 2525; 45 L Ed 2d 562 [1975]); cf. Constitutional Law--Right to Counsel, 49 Geo Washington L R 399, 409-410 (1981) (Miranda warnings sufficient unless defendant indicted before arrest). United States Supreme Court

Justice Thurgood Marshall has also consistently advocated a higher standard for waiver of the Sixth Amendment right to counsel. See Wyrick v Fields (Marshall, J., dissenting), 459 US 42, 54-55; 103 S Ct 394; 74 L Ed 2d 214 (1982), cert den after remand ___ US ___; 104 S Ct 556; 78 L Ed 2d 728 (1983).

16

Mohabir involved an indirect request for counsel to the arraigning magistrate. Before interrogation, defendant was advised several times of his Miranda rights, the nature of the charges against him, and the fact that he had been indicted. He was also given a copy of the indictment, but was not informed of the significance thereof. During interrogation, defendant was asked if he would need counsel appointed for arraignment. He replied affirmatively, but questioning

continued. The arraigning magistrate was informed of defendant's request and contacted an attorney to represent defendant.

17

The Mohabir Court refused to allow the prosecutor to give this advice since he is an adversary of the defendant. It postponed consideration of a third alternative, i.e., "outlawing" all statements made by an indicted defendant following an uncounseled waiver. The Court noted that such an approach could conflict with the defendant's constitutional right to represent himself under Faretta v California, supra. Mohabir, supra, 624 F2d 1151-1153.

18

The Court of Appeals relied primarily on Blasingame in concluding that Bladel and Jackson's post-arraignment statements

were admissible.

19

However, since the interrogation related to a criminal episode unrelated to the one on which defendant was arraigned and for which counsel was obtained, the Sparklin Court concluded that the confession was properly obtained. 672 p2d 1188.

20

Although the United States Supreme Court sidestepped this issue in Brewer, supra, 430 US 405-406, it suggested that a Sixth Amendment waiver is not precluded in Estelle v Smith, 451 US 454, 471, fn 16; 101 S Ct 1866; 68 L Ed 2d 359 (1981). Moreover, the Supreme Court has stated that the Sixth Amendment right to counsel may be waived at a post-indictment line-up. Wade, supra, 388 US 237. In addition, a defendant has a constitutional right to

waive the assistance of counsel at trial, as long as the trial court advises the defendant of the dangers and disadvantages of self-representation and the defendant knowingly and voluntarily waives his right to counsel. Faretta, supra, 422 US 835; People v Anderson, 398 Mich 361, 368; 247 NW2d 857 (1976).

21

See also 82 Colum L R, supra, pp 372-373.

22

We do not decide under what circumstances the police may interrogate a defendant who has not specifically requested appointed counsel at arraignment, or who has already consulted with counsel. We note only that these defendants must waive both their Fifth and Sixth Amendment rights to counsel before post-arraignment interrogation may proceed.

23

This rule is consistent with the result reached in People v Green, 405 Mich 273; 274 NW2d 448 (1979), since defendant there reinitiated further communications with the police. However, we do not suggest that the warnings given in Green are sufficient to effectuate a valid waiver of the Sixth Amendment right to counsel. That issue was not presented in Green and we need not decide it here.

24

Solem, supra, p 589; cf. Paintman, supra, 412 Mich 530-531.

25

On appeal to this Court, defendant does not challenge the trial court's findings that he was properly advised of his rights before each statement was given and that he never requested an attorney until arraignment. Our independent

review of the record does not disclose that these findings are clearly erroneous.

Since the trial court found the police officers to be more credible, the following discussion of the facts is based upon the officers' testimony at the Walker hearing.

26

However, our conclusion in no way condones the officers' actions. Defendant's first confession, when coupled with Knight's statement, presented more than enough evidence to arraign defendant for conspiracy and first-degree murder. The only purpose in recording defendant's statement was to strengthen the prosecution's case against him and his codefendants prior to arraignment. The result in

this case might have been different if the first oral statement had been obtained earlier in the day, if it had materially differed from the subsequent recorded statements, or if the recorded statements were the product of more intensive interrogation.

27

Plaintiff suggests that even if an unnecessary pre-arraignment delay occurred, the ultimate test for purposes of the exclusionary rule is whether the statement obtained was voluntary or coerced. See, e.g., People v Wallach, 110 Mich App 37, 59, fn 5; 312 NW2d 387 (1981), vacated and remanded on other grounds 417 Mich 937; 331 NW2d 730 (1983); People v Antonio Johnson, 85 Mich App 247, 252-253; 271 NW2d 177 (1978). Although earlier decisions of this Court could be interpreted in this manner, see e.g., People v

Farmer, 380 Mich 198; 156 NW2d 504 (1968); People v Ubbes, 374 Mich 571; 132 NW2d 669 (1965); People v Harper, 365 Mich 494; 113 NW2d 808 (1962); Hamilton, supra, an examination of White, supra, 392 Mich 424-425, reveals that this Court now treats the question of pre-arraignment delay apart from the issue of voluntariness. If voluntariness were the only relevant inquiry, there would be no reason to analyze whether a pre-arraignment delay occurred and was used as a tool, since involuntary statements have always been held inadmissible regardless of when they are obtained. Prompt arraignment serves several important functions apart from preventing improper custodial interrogations. See Mallory, supra, ___ Mich ___ (slip op, p 5).

28

A review of the police officers' test-

imony reveals that if any threats or promises were made to defendant, they occurred after the second taped statement. Sergeant Ericson testified that he told defendant after the second taped statement that the police were primarily after Ms. Perry. Leniency was not mentioned until after the post-arraignment statement. Sergeant Garrison stated that defendant may have mentioned not wanting to go to jail on July 31, but he was informed that the police could not authorize pleas to less serious offenses. Sergeant Hoff testified that no one discussed pleas on July 31. He did mention the possibility of a plea to second-degree murder if defendant cooperated and if the prosecutor agreed. However, this discussion occurred after the polygraph examination.

S T A T E O F M I C H I G A N

SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v No. 69615

ROBERT BERNARD JACKSON,

Defendant-Appellant.

BEFORE THE ENTIRE BENCH

RYAN, J. (concurring in part and dissenting in part).

I concur in part III-C of my brother Cavanagh's opinion with the exception, however, that since the Edwards/Paintman ruling derives from an analysis of the United States Constitution, I find it unnecessary and, indeed, inappropriate to base the result in these cases upon Const 1963, art 1, §20.

I do not agree, however, that the record in this case supports my brother's conclusion that the "post-polygraph" statements given by defendant Jackson are inadmissible for the reason stated. In my judgment, it is mere appellate speculation to conclude that the failure to arraign defendant Jackson during the morning of August 1 was "unnecessary pre-arraignment delay and that the delay was employed as a tool to extract these statements." That conclusion carries with it the implicit charge that the Livonia police contrived to lawlessly delay the defendant's arraignment on the mere pretext of completing unnecessary "paperwork," but for the actual purpose of extracting more confessions from him knowing that procedure to be improper. In my judgment, that conclusion is unsupported in the record.

This Court's opinion at this appellate remove, four and one-half years after the event, that the Livonia police may have had enough evidence at 9:30 a.m. on the morning of August 1 to obtain a recommendation for a warrant from an assistant Wayne County Prosecuting attorney, and in turn to obtain an arrest warrant from a district judge, without benefit of further interrogation of Jackson, might be correct. If so, the conclusion that it was unnecessary to delay defendant Jackson's arraignment until the afternoon might likewise be correct. It does not follow therefrom, however, that the decision of the Livonia police to proceed with the preparation of a 36-page warrant request, to conduct a polygraph examination to which the defendant Jackson had agreed the night before, and to question Jackson following the failed polygraph

examination, decisively demonstrate that the officers unnecessarily delayed arraigning Jackson as a ruse to "extract the post-polygraph statements." It is equally plausible, on the record before us, that the officers honestly believed that they were insufficiently prepared to request and obtain a warrant in this major "murder for hire" case until the statutorily required warrant request was properly completed and approved, the previously scheduled polygraph examination was completed, and the defendant was afforded the opportunity to reconcile, if he wished to, the conflicts it revealed. See United States v Lovasco, 431 US 783, 791; 97 S Ct 2044; 52 L Ed 2d 752 (1977) ("[P]rosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt

beyond a reasonable doubt").

/s/ James L. Ryan

/s/ James H. Brickley

S T A T E O F M I C H I G A N

SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v No. 69615

ROBERT BERNARD JACKSON,

Defendant-Appellant.

BOYLE, J. (dissenting).

In People v Jackson, I concur with the part of Justice Ryan's opinion regarding the post-polygraph statements. I would also find that appellant Jackson's post-arraignment statement, which it is undisputed was a repetition of the verbal and written statement given on August 1 in which the defendant confessed that he was the shooter, was, in light of the overwhelming evidence, if error, harmless

beyond a reasonable doubt. Chapman v California, 386 US 18; 87 S Ct 824; 17 L Ed 2d 705 (1967). I would find in People v Bladel that the Sixth Amendment right to counsel, which the people concede had attached, was waived. Brewer v Williams, 430 US 387; 97 S Ct 1232; 51 L Ed 2d 424 (1977), itself permits waiver. In concluding that waiver did not occur, Justice Stewart for the majority noted, "The Court of Appeals did not hold, nor do we, that under the circumstances of this case, Williams could not, without notice to counsel have waived his rights under the Sixth and Fourteenth Amendments." Id., pp 405-406. Justice Stewart further emphasized that the detective "did not preface this effort [to elicit a response] by telling Williams that he had a right to the

presence of a lawyer, and made no effort at all to ascertain whether Williams wished to relinquish that right." 430 US 405. In Bladel it is clear that when the defendant mentioned he had asked for an appointed attorney he was asked if he wanted an attorney present and the defendant stated that he did not need one. I would find an intentional relinquishment of a known right.

While I recognize both the importance of the Sixth Amendment right to counsel and the appeal of the symmetrical application of Edwards v Arizona, 451 US 477; 101 S Ct 1880; 68 L Ed 2d 378 (1981), and People v Paintman, 412 Mich 518; 315 NW2d 418 (1982), I am convinced without further guidance from the United States Supreme Court that we are consti-

tutionally obligated to reach this result.

/s/ Patricia J. Boyle

ORIGINAL

NO. 84-1531

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

STATE OF MICHIGAN

Petitioner,

v.

ROBERT BERNARD JACKSON

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

AFFIDAVIT

PROOF OF SERVICE

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATE APPELLATE DEFENDER OFFICE

James R. Neuhard (P18253)
Defender

James Krogsrud (P28406)
Assistant Defender
Third Floor, North Tower
1200 Sixth Avenue
Detroit, Michigan 48226
(313) 256-2814

Counsel for Respondent

Dated: April 18, 1985

NO. 84-1531

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

STATE OF MICHIGAN

Petitioner,

v.

ROBERT BERNARD JACKSON

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent, **ROBERT BERNARD JACKSON**, who is now held in the Prison for Southern Michigan, asks leave to file the attached Brief in Opposition to a Petition for a Writ of Certiorari to the Supreme Court of the State of Michigan (without prepayment of costs) and to proceed in forma pauperis pursuant to Rule 46.

The respondent's affidavit in support of this motion is attached hereto. Respondent has been represented by appointed counsel for all post-conviction proceedings. See attached Order.

JAMES R. NEUHARD (P18253)
Defender

JAMES KROGSRUD (P28406)
Assistant Defender
Third Floor, North Tower
1200 Sixth Avenue
Detroit, Michigan 48226
(313) 256-2814

Counsel for Respondent

Dated: April 18, 1985

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

S.J.S.M. Spring Arbor College
Jackson, Michigan 49204 $ 70.00

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

---

2. Have you received within the past twelve months any income from any of following sources?

a. Business, profession or form of self-employment?

Yes ___ No ✓

b. Rent payments, interest or dividends?

Yes ___ No ✓

c. Pensions, anuities or life insurance payments?

Yes ___ No ✓

d. Gifts or inheritances?

Yes ___ No ✓

e. Any other sources?

Yes ___ No ✓

If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

---

3. Do you own any cash or checking or savings account?

Yes ✓ No ___ (Include any funds in prison accounts.)

If the answer is yes, state the total value of the items owned.

$ 73.50

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes ___ No ✓

If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support

None

I understand that a false statement or answer to any question in the affidavit will subject me to penalties for perjury.

Robert Bernard Jackson

ROBERT BERNARD JACKSON

SUBSCRIBED AND SWORN TO before me,
this ___ day of _____, 1985

APR 03 1985

Julia Fabbri

Notary Public, _____ County,
Michigan
My Commission Expires:

FREDERICK T. SPALLA, JR.
Notary Public, Jackson County, MI
My Commission Expires June 3, 1987

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

FILED
JAMES R. KILLEEN
WAYNE COUNTY CLERK
MAR 19 1980
By J Borahan

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff

v

No. 79 928-559 FH

Robert Bernard Jackson
Defendant

ORDER ~~DENYING~~ APPOINTING APPEAL COUNSEL AND PROVIDING FOR TRIAL TRANSCRIPT

At a session of said court held in the Wayne County Court Building in the City of Detroit on 19th of March 1980.

PRESENT Honorable Horace W. Gilmore
Circuit Judge

Upon reading and filing the defendant's petition alleging that he is financially unable to retain appellate counsel to represent him and is unable to furnish counsel with the portion of the record that counsel requires to prepare postconviction motions and to perfect an appeal, IT IS ORDERED:

☐ That the defendant's request for appellate counsel is hereby denied.

☒ That for the purpose of appeal of this case to the Court of Appeals, State Appellate Defender, attorney at law, is hereby appointed appellate counsel for the defendant.

☒ That Elizabeth Horn, court stenographer, furnish to counsel the portion of the trial transcript requested by counsel for postconviction motions and the perfection of an appeal, and that the stenographer be compensated for the transcript as provided by law.

Jury Trial
Started 11/15/79

Horace W. Gilmore
Circuit Judge

Approved by the
State Court Administrator

Form No. C-101 Rev. 12/77

NO. 84-1531

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

STATE OF MICHIGAN

Petitioner,

v.

ROBERT BERNARD JACKSON

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STATE APPELLATE DEFENDER OFFICE

James R. Neuhard (P18253)
Defender

James Krogsrud (P28406)
Assistant Defender
Third Floor, North Tower
1200 Sixth Avenue
Detroit, Michigan 48226
(313) 256-2814

Counsel for Respondent

Dated: April 18, 1985

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE MICHIGAN SUPREME COURT'S JUDGMENT REVERSING RESPONDENT'S CONVICTION WAS BASED ON THE ADEQUATE AND INDEPENDENT STATE GROUNDS, I.E., A VIOLATION OF STATE PROMPT ARRAIGNMENT STATUTES, THUS THE POST-ARRAIGNMENT RIGHT TO COUNSEL ISSUE WAS REACHED ONLY BECAUSE IT WAS NECESSARY FOR A COMPANION CASE?

II. WHETHER THIS CASE DOES NOT PRESENT AN APPROPRIATE VEHICLE FOR DECIDING HOW THE SIXTH AMENDMENT APPLIES TO POST-ARRAIGNMENT INTERROGATION GIVEN THE VOLUMINOUS RECORD IN THIS CASE AND THE MOOTNESS OF THE QUESTION INVOLVED?

III. WHETHER THE DECISION OF THE MICHIGAN SUPREME COURT TO SUPPRESS RESPONDENT'S POST-ARRAIGNMENT CONFESSION WAS BASED ON ADEQUATE AND INDEPENDENT STATE GROUNDS, SPECIFICALLY, A NEW STATE RULE DEVELOPED BY ANALOGY TO FEDERAL LAW?

IV. WHETHER THE MICHIGAN SUPREME COURT ACCURATELY INTERPRETED FEDERAL CONSTITUTIONAL PRINCIPLES IN ESTABLISHING A NEW STATE RULE GOVERNING POLICE INTERROGATION PRACTICES AFTER AN ACCUSED HAS REQUESTED COUNSEL AT ARRAIGNMENT?

TABLE OF CONTENTS

jak*jak4090brs*04-01-85
Jackson, Robert

INDEX OF AUTHORITIES

COUNTERSTATEMENT OF THE CASE

Respondent adopts the Facts as set out in the opinion of the Michigan Supreme Court. Slip Opinion, 3-5, 21-25. See Petitioner's Appendix, 45-50, 89-100.

REASONS FOR DENYING THE WRIT

I. THE MICHIGAN SUPREME COURT'S JUDGMENT REVERSING RESPONDENT'S CONVICTION WAS BASED ON THE ADEQUATE AND INDEPENDENT STATE GROUNDS, I.E., A VIOLATION OF STATE PROMPT ARRAIGNMENT STATUTES, THUS THE POST-ARRAIGNMENT RIGHT TO COUNSEL ISSUE WAS REACHED ONLY BECAUSE IT WAS NECESSARY FOR A COMPANION CASE.

In this case, the Michigan Supreme Court ruled that the last 4 of 7 statements should not have been admitted into evidence in Respondent's state trial. Although the 7th statement was made after arraignment, the last 4 were obtained as a result of police tactics in delaying arraignment. In Part IV of their opinion, the Michigan Supreme Court relied exclusively on State law to suppress Respondent's pre-arraignment and post-polygraph statements. The Court stated:

> "Although the police had sufficient probable cause to obtain a warrant for defendant Jackson's arrest as a result of codefendant Knight's statements, they did not do so. Defendant was 'arrested' on the murder charges on Tuesday, July 31, at 2 p.m. when he was turned over to the Livonia police. Since defendant was arrested for a felony without a warrant, the arresting officers were required to bring him before a magistrate for arraignment without unnecessary delay. MCL 764.13; MSA 28.871(1); MCL 764.26; MSA 28.885;[1] People v

---

1/ "A peace officer who has arrested a person for a felony offense without a warrant must without unneces-sary delay, take the person arrested before the most convenient magistrate of the county in which the offense was committed,

(Footnote Continued on Next Page)

Mallory, ___ Mich ___; ___ NW2d ___ (1984) (slip op, p 5); People v White, 392 Mich 404, 424; 221 NW2d 357 (1974), cert den sub nom Michigan v White, 420 US 912; 95 S Ct 835; 42 L Ed 2d 843 (1974)." Slip Opinion, 21. See Petitioner's Appendix, 90.

• • •

> "The delay was used as a tool to extract the three post-polygraph statements. Sergeants Ericson, Hoff, and Garrison all testified that they asked defendant to submit to a polygraph so that they could determine whether he was telling the truth. Although they did not specifically instruct the examiner to obtain a statement, Sergeant Hoff testified that they had hoped to obtain another statement if defendant's original confession proved inaccurate. The police were obviously attempting to strengthen their case against all four defendants, particularly White, who had not yet confessed to any involvement. The three post-polygraph confessions therefore were not admissible." Slip Opinion, 25. See Petitioner's Appendix, 99-100.

Petitioner admits that "the Michigan Supreme Court held that the fourth, fifth and sixth statements were obtained as a result of the violation of a state 'prompt arraignment' statute." Petition, pp 12-13. However, Petitioner asserts that this Court should accept this case for review because the Michigan Supreme Court found a separate ground for suppressing the seventh and last of Respondent's statements. Petition, p 13.

In 1960, based on State statutes, see fn 1, and the State constitutional guarantee of due process, then Mich Const 1908,

---

(Footnote Continued From Previous Page)

> and must make before the magistrate a complaint, stating the offense for which the person was arrested." MCL 764.13; MSA 28.871(1).
>
> "Every person charged with a felony shall, without unnecessary delay after his arrest, be taken before a magistrate or other judicial officer and, after being informed as to his rights, shall be given an opportunity publicly to make any statement and answer any questions regarding the charge that he may desire to answer." MCL 764.26; MSA 28.885.

art 2, § 16; now Mich Const 1963, art 1, § 17, Michigan became the first State to adopt an exclusionary principle similar to that announced in McNabb v United States, 318 US 332; 63 S Ct 608; 87 L Ed 819 (1942). People v Hamilton, 359 Mich 410, 411; 102 NW 2d 738 (1960). Following the rationale of McNabb, the Michigan Supreme Court held inadmissible statements made during detention where arraignment had been delayed for the purpose of obtaining a confession. People v Hamilton, supra. See also, People v Harper, 365 Mich 494, 502-503; 113 NW 2d 808 (1962); People v Farmer, 380 Mich 198; 156 NW 2d 504 (1968); People v White, 392 Mich 404, 424, 221 NW 2d 457 (1974).

It is readily apparent that the Michigan Supreme Court's separate ground for suppression of the last confession, see Parts I-III, was an additional ground which the Court needed to reach only for the companion case, People v Rudy Bladel, Mich S Ct No. 69749. All four of Respondent's confessions suppressed were obtained while police unreasonably delayed Respondent's arraignment. Although it is difficult to imagine how the occurrence of an arraignment before the seventh and last confession would cure the unreasonable delay, if such an argument were to be made it must be on state grounds and in the state courts. Therefore, this Court should deny the Petition for Writ of Certiorari because the decision of the Michigan Supreme Court to reverse Respondent's case was "alternatively based on bona fide separate, adequate, and independent grounds." Michigan v Long, ___ US ___; 103 S Ct ____; 77 L Ed 2d 1201, 1214 (1983).

Finally, if this Court remains troubled by the question of federal jurisdiction, Respondent urges that this Court follow the traditional presumption against taking jurisdiction. Lynch v New York, 293 US 52; 55 S Ct 16; 79 L Ed 191 (1934). But see, Michigan v Long, supra.

II. THIS CASE DOES NOT PRESENT AN APPROPRIATE VEHICLE FOR DECIDING HOW THE SIXTH AMENDMENT APPLIES TO POST-ARRAIGNMENT INTERROGATION GIVEN THE VOLUMINOUS RECORD IN THIS CASE AND THE MOOTNESS OF THE QUESTION INVOLVED.

The Michigan Supreme Court found the last four of Respondent's seven statements to be inadmissible in his state trial. The Petitioner now asserts in the Petition for Writ of Certiorari:

> "In their opinion, the Michigan Supreme Court held that the fourth, fifth, and sixth statements were obtained as a result of the violation of a state 'prompt-arraignment' statute. The Petitioner recognizes that this decision is not before this Honorable Court.
>
> • • •
>
> "Even though a re-trial of this respondent must be held, it is vital that this seventh statement be found to be admissible for the reason that in it, respondent admits that he was in fact the shooter, contrary to his earlier, admissible, statements. Thus, this petition presents a 'live' issue to this Honorable Court." (Petition for Writ, pp 12-13; emphasis added).

The record in Respondent's case includes more than 3800 pages of transcript. The hearing on Defendant's Motion to Suppress lasted seven (7) days and produced nearly 800 pags of transcript. It is incredulous that Petitioner now asks this Court to expend scarce federal judicial resources to review this case "even though a retrial of this respondent must be held". Assuming arguendo the substantiality of the single confession issue raised by Petitioner, this Court could certainly find a more appropriate vehicle to resolve the issue.

III. THE DECISION OF THE MICHIGAN SUPREME COURT TO SUPPRESS RESPONDENT'S POST-ARRAIGNMENT CONFESSION WAS BASED ON ADEQUATE AND INDEPENDENT STATE GROUNDS, SPECIFICALLY, A NEW STATE RULE DEVELOPED BY ANALOGY TO FEDERAL LAW.

In Respondent's case, the Michigan Supreme Court did not rely solely on the Federal Constitution to make its decision. Instead, the Court based its decision on the State and Federal Constitutions, analogizing to federal principles. In the opening paragraph of their decision, the Michigan Supreme Court stated:

> "The common issue presented in these appeals is whether statements obtained after a defendant has requested appointment of counsel at arraignment are admissible pursuant to the principles enunciated in Edwards v Arizona, 451 US 477; 101 S Ct 1880; 68 L Ed 2d 378 (1981), and People v Paintman, 412 Mich 518; 315 NW 2d 418 (1982), cert den 456 US 995; 102 S Ct 2280; 73 L Ed 2d 1292 (1982)." Slip Opinion, p 1; (Emphasis added). See Petitioner's Appendix, 40.

After reviewing analagous cases from other jurisdictions, both state and federal, the Michigan Supreme Court stated their holding as follows:

> "We need not decide at this time whether stricter procedural standards for waiver of the Sixth Amendment right to counsel are required. We need only hold that at a minimum, the Edwards/Paintman rule applies by analogy to those situations where an accused requests counsel before the arraigning magistrate." See Petitioner's Appendix, 82-83.
>
> • • •
>
> "We have merely extended the Edwards/Paintman rule by analogy to cases involving requests for counsel during arraignment, on the basis of our interpretation of both the Sixth Amendment right to counsel and its state constitutional counterpart embodied in Const 1963, art 1, § 20." (Emphasis by Court). See Petitioner's Appendix, 88.

The Michigan Supreme Court's analogy to the Federal Constitution and federal cases does not establish that that Court based its decision solely on the Federal Constitution. Since a

great deal of litigation concerning right to counsel issues has been in the federal courts, it would have been strange if the Michigan Supreme Court had not considered the federal decisions by analogy. Moreover, the Michigan Supreme Court stated unequivocally that the "basis" for decision "by analogy" was their interpretation of the Federal and State Constitutions. The Court did not hold the interrogation violative of the Federal Constitution, nor did the Court state that they were following any decision of another jurisdiction. Thus, the Michigan Court has established a new State judicial rule governing police conduct based on the State Constitution.

If there is any doubt as to whether the Michigan Supreme Court intended to establish adequate and independent state grounds, Justice Ryan (dissenting) settled the issue by stating his objection to the Court's holding based on the State Constitution. Justice Ryan stated:

> "I concur in part III-C of my brother Cavanagh's opinion with the exception, however, that since the Edwards/Paintman ruling derives from an analysis of the United States Constitution, I find it unnecessary and, indeed, inappropriate to base the result in these cases upon [Michigan] Const 1963, art 1, § 20." See Petitioner's Appendix, 122.

IV. THE MICHIGAN SUPREME COURT ACCURATELY INTERPRETED FEDERAL CONSTITUTIONAL PRINCIPLES IN ESTABLISHING A NEW STATE RULE GOVERNING POLICE INTERROGATION PRACTICES AFTER AN ACCUSED HAS REQUESTED COUNSEL AT ARRAIGNMENT.

The State and Federal Constitutions both guarantee the right to counsel. Mich Const 1963, art 1, § 20; US Const, Ams VI, XIV. The purpose of the constitutional right to counsel is to provide the accused with legal assistance during the critical stages[2/] of the criminal process. See, e.g., Brewer v Williams,

---

2/ There is little doubt that each of no less than seven (7) interrogation sessions were a critical stage in the

(Footnote Continued on Next Page)

430 US 387, 398; 97 S Ct 1232; 51 L Ed 2d 424 (1977); Powell v Alabama, 287 US 45; 57; 53 S Ct 55; 77 L Ed 158 (1932). This constitutional right has been afforded as a protection for the individual from the awesome power of the government. Police authorities should not be permitted to subvert the intent of our founding documents by hypertechnical interpretations of its guarantees.

There is no serious disagreement among legal authorities that the right to counsel attaches no later than at arraignment. See e.g., Kirby v Illinois, 406 US 682, 688-690; 92 S Ct 1877; 32 L Ed 2d 411 (1972). See also, People v Anderson, 389 Mich 155, 171-172; 205 NW 2d 401 (1973) [right to counsel at pre-indictment identifiction procedures]. Once the State has commenced criminal proceedings and the accused has requested counsel, the constitution forbids all efforts by the State to elicit incriminating information from the accused. United States v Henry, 447 US 264; 100 S Ct 2183; 65 L Ed 2d 115 (1980); Massiah v United States, 377 US 201; 84 S Ct 1199; 12 L Ed 2d 246 (1964).

There is no dispute that Robert Jackson formally requested the appointment of counsel at his arraignment. In addition to violating Jackson's constitutional privilege against self-incrimination, the post-arraignment int rrogation violated his right to counsel. Because "the policies underlying the two

---

(Footnote Continued From Previous Page)

> prosecution of Robert Jackson. The police were not merely investigating an unsolved crime, Jackson had become the accused and the purpose of the interrogation was to "persuade" him to confess despite his constitutional right not to do so. "It would exalt form over substance to make the right to counsel . . . depend on whether at the time of the interrogation, the authorities had secured a formal indictment. Petitioner had, for all practical purposes, already been charged with murder." Escobedo v Illinois, 378 US 478, 486; 84 S Ct 1758; 12 L Ed 2d 977 (1964).

constitutional protections are quite distinct," Rhode Island v Innis, 446 US 291, 300, fn 4; 100 S Ct 1682; 64 L Ed 2d 297 (1980), an accused may waive his right to remain silent without waiving his right to counsel. Justice Marshall, dissenting, in Wyrick v Fields, 459 US 42; 103 S Ct 394; 74 L Ed 2d 213, 223 (1982), aptly described the high standard which the prosecution must meet to establish a waiver of the Sixth Amendment right to counsel:

> "To establish a waiver of the Sixth Amendment right to counsel, it is therefore not enough for the State i point to conduct - such as the initiation of a conversation - that demonstrates that the defendant's statements were made voluntarily. Since a Sixth Amendment violation does not depend upon coercion, the protection of the Sixth Amendment is not waived by conduct that shows only that a defendant's statements were not coerced. The State must show that the Defendant intelligently and knowingly relinquished his right not to be questioned in the absence of counsel. The State can establish a waiver only by proving '" an intentional relinquishment or abandonment"' of the right to have counsel present. Brewer v Williams, supra, 430 US at 404, 51 L Ed 2d 424, 97 S Ct 1232, quoting Johnson v Zerbst, 304 US 458, 464, 82 L Ed 1461, 58 S Ct 1019 (1938).
>
> "Given the different policies underlying the Fifth and Sixth Amendments, it is not surprising that a number of courts have held that '"[w]arnings by law enforcement officers and subsequent action by the accused that might suffice to comply with Fifth Amendment strictures against testimonial compulsion [do] not necessarily meet . . . the higher standard with respect to waiver of the right to counsel that applies when the Sixth Amendment right to counsel has attached."' United States v Mohabir, 624 F2d 1140, 1147 (CA 2, 1980), quoting United States v Massimo, 432 F 2d 324, 327 (CA 2, 1970) (Friendly J., dissenting) (majority did not reach the issue), cert denied, 400 US 1022; 27 L Ed 2d 633; 91 S Ct 586 (1971)." (footnotes omitted).

Practically speaking, when Robert Jackson exercised his right to counsel at arraignment, it is likely that his appreciation of

the value of counsel differed very little from when the Livonia Police advised him prior to arraignment. The magistrate did not expound on counsel's value, he simply noted that Jackson had petitioned for counsel. The reasonable conclusion to be drawn is not that Robert Jackson was exercising a mere formality. Jackson, as he had from the time of his arrest, was seeking every opportunity to preserve his freedom. When dependent upon police advice, the right to counsel, like the right to remain silent, was flim-flammed away by police who viewed this precious right as an obstacle to a deal. But when formally offered without the strings attached by police, the right to counsel was quite naturally embraced by Jackson.

Robert Jackson's formal request for counsel at arraignment was a request for the assistance of counsel against the "prosecutorial forces of organized society" in all forums and forms where the State would seek to incriminate and convict. The State should not be permitted to circumvent this unequivocal request in open court by merely extending the same stationhouse Miranda advice which the Livonia Police could so neatly explain away in subsequent discussions about what these rights "really mean" to the defendant. The police should not be the ones[3/] who say whether an accused has waived a right asked for and given in open court, which they think stands between them and wrapping up a confession. Logically, a post-arraignment waiver of counsel should not valid unless done after consultation with counsel or after proper inquiry pursuant to Faretta v California, 422 US 836; 95 S Ct 2525; 45 L Ed 2d 562 (1975).

3/ "Sed quis custodiet ipsos Custodes?." (But who is to guard the guards themselves?) Decimus Junius Juvenal. c. 50-130 A.D.. Barlett, J.. Familiar Quotations, p 139.

Under any recognized standard the prosecution cannot establish a valid waiver of Robert Jackson's right to counsel. The Michigan Supreme Court accurately interpreted federal constitutional principles in reaching their decision by analogy. The new Michigan rule now requires police to adhere to at least the same safeguards formulated in Edwards v Arizona, 451 US 477; 101 S Ct 1880; 68 L Ed 2d 378 (1981) and its progeny. Assuming arguendo that the Michigan Court did not establish a new State rule, this Court need not review a case which accurately interprets federal principles.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the petition for a writ of certiorari.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

By:
JAMES R. NEUHARD P18253
Defender

By:
JAMES KROGSRUD P28406
Assistant Defender
Third Floor, North Tower
1200 Sixth Avenue
Detroit, Michigan 48226
(313) 256-2814

Dated: April 18, 1985

(5)

34-1531

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

THE PEOPLE OF THE STATE OF MICHIGAN,
PETITIONER

vs.

ROBERT BERNARD JACKSON,
RESPONDENT

ON WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

JOINT APPENDIX

JOHN D. O'HAIR
Prosecuting Attorney
County of Wayne

TIMOTHY A. BAUGHMAN
Deputy Chief,
Civil and Appeals

A. GEORGE BEST II (P-27749)
Assistant Prosecuting Attorney
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5827

173 pp

TABLE OF CONTENTS

DOCKET ENTRIES

Issuance of Complaint and Warrant.....1 August 1979

Arraignment on Warrant.....1 August 1979

Preliminary Examination...24 August 1979, 17 September 1979

Walker Hearing.....15-28 September 1979

Trial.....29 November 1979 to 4 February 1980

Sentence.....14 February 1980

PETITIONER'S ENTRIES

SGT. R. ERICSON (15 November 1979):

-66-

Q. What did you do after the warrant request was prepared?

A. I went to the out county branch of the Wayne County Prosecutor's Office and presented it.

Q. How long were you there, when did you leave, what did you do after that?

A. I spent approximately two hours there meeting with Mr. Sage and some of his assistants while he reviewed the request and while the warrant was prepared. I returned, left the out

-67-

county branch of the Prosecutor's Office about four o'clock. I arrived at the 16th District Court in Livonia somewhere near four-thirty, four-twenty, some place in there.

Q. Now the warrant that was approved by Mr. Sage of the Prosecutor's Office, who were the named defendants on that warrant?

A. Mildred Vernell Perry, Charlie Knight, Bobby Jackson, and Michael White.

Q. What happened after you got back to the police station?

A. I didn't go to the police station. I went directly to court from the Prosecutor's Office.

Q. What happened when you got to court?

A. I talked briefly with Mr. Bockoff, Mildred Perry's attorney, in the hallway, and then it was a matter of waiting for the court to convene.

Q. Did the court convene, and if so, what was done in court?

A. The court voir dired me relative to the issuant of the warrant. At the completion of my testimony, the judge did issue the warrant and the four defendants were brought before the court and arraigned and there were two search warrants issued.

Q. Where were the defendants taken after the arraignment?

A. Back to the Livonia police station.

Q. After that did you speak with any of the defendants at any other time following the arraignment on the warrant?

-68-

A. Yes, I did.

Q. Who, where, and when?

A. I sat in while statements were taken from all three male defendants or from I should say Bobby Jackson, a new statement was taken from him --

THE COURT: (Interposing) When was this, now?

THE WITNESS: That was during the same evening of the arraignment.

THE COURT: You mean August 1st?

THE WITNESS: Yes, sir. And then the next morning we took another statement or took a statement from Michael White.

BY MR. SELLER:

Q. The next morning, which would be August 2nd?

A. I believe -- yes.

Q. Now what was the purpose in taking another statement from Robert Jackson?

A. Well, I had learned during the day, while I was preparing the warrant request that I submitted to the prosecutor, that Bobby Jackson had now changed his statement.

Q. And in the statement that was taken from Robert Jackson on the 1st, following the arraignment, did his story change?

A. Yes, it did.

Q. In what sense?

A. His words were, as a matter of preface, after the Miranda warnings and some of the other amenities, was that anything he said originally that he did, Mike White did, and anything that he said Charlie Knight did, he, Bobby Jackson did. So what he in sum and substance told us was that he had switched roles. In other words, he had placed Charlie Knight in his position. The reason for this was vengeance.

Q. Then what was the substance, very briefly, of the last statement taken from Robert Jackson?

A. That he in fact was the shooter and actually shot Elwood Perry and that Michael White was the person that went with him, had secured the gun, furnished him with the gun, gone into the house.

Q. Now prior to taking that statement, did you again advise Mr. Jackson of his rights?

A. Sergeant Hoff did.

Q. All right. And was that statement recorded?

A. Yes.

Q. Is that recording here in the courtroom today?

A. Yes, sir.

Q. Were any of the three recorded statements of Mr. Jackson that you have referred to transcribed?

A. Yes, they were. The last two were.

Q. Why not the first one?

A. The tape was of a poor quality, it was scratchy, not entirely

audible.

Q. All right. Are those transcripts here in the courtroom today?

A. They are.

Q. Now you testified that in addition you spoke with or took a statement from Michael White, is that correct, following the arraignment?

A. Yes.

Q. Where and when was that statement taken?

A. That was taken in the classroom in the lower level of the police station, if I remember correctly. Sergeant Hoff conducted that interview, led that interview. Sergeant Garrison and myself stood beside him or sat beside him as he conducted the interview.

Q. Now was that statement tape-recorded?

A. Yes.

Q. Is that tape in the courtroom today?

A. It is.

Q. Was that tape recording transcribed?

A. It was.

Q. Is that transcript in the courtroom today?

A. It is.

Q. Did you take any other statements from any other defendant durant the time period that we have talked about that you have not already told us about?

A. I believe we have them all.

Q. Prior to each of these statements that we have referred to, did you tell each defendant or each person giving the statement their Miranda rights?

A. I did or another officer, Sergeant Hoff, did in my presence.

Q. All right. Was it each time done in the way that --

MR. DURANT: (Interposing) Your Honor, I am going to object. That is leading.

THE COURT: I haven't heard the question yet.

MR. DURANT: I will wait until he finishes the question.

MR. SELLER:

Q. Was it done each time in a manner similar to the way you earlier went through it for us from the witness stand?

MR. DURANT: Your Honor --

THE COURT: (Interposing) He can answer that.

THE WITNESS: Each of the defendants was given a written Miranda warning sheet, a Livonia Police Department form, and asked to sign it and review it and asked if they understood it. Mr. Jackson's was given to him by me at five-oh-two on the day of his arrest and his signature was witnessed by Sergeant Garrison.

* * *

-130-

BY MR. WILLIS:

Q. Sir, during the time Mr. Jackson was being questioned, in other words, from the date and time you first arrested him until such time as he gave the last statement, August 2nd, 1979, he was not permitted to have any visitors, was he?

A. I thought some members of his family were at the station to see him and I know that he was allowed to make telephone calls.

Q. As a matter of fact, one member of his family who was at the station was Frank Crockett (sp), isn't that correct?

A. I am sorry, I don't know.

Q. But those members were not allowed to see him, were they, though they were at the station?

A. I had thought that he had received visitors. There were times

-131-

when we couldn't let him receive visitors because we were engaged in the taping.

Q. I see. You thought he had received visitors between July 31st, 1979, at three p.m., and August 2nd, 1979, at ten twenty-four a.m.?

A. Well, I know he received visitors between them.

Q. I see. From his family?

A. Yes.

Q. Who?

A. I believe that his mother and some other members of his family were present in court at the time of the arraignment on the Information.

Q. I mean at the Livonia police station while he was in custody did he receive any visitors?

A. I had thought that he had.

Q. You thought based on what? Had you seen anyone or had you read any log or anything?

A. No.

Q. What was that based on?

A. He had had contact with his family members, I had seen his family members at the station, and I know of no reason why they wouldn't be allowed to visit with him.

Q. You are saying then that you did not direct that he not receive any visitors?

A. That is correct.

-132-

Q. Did you ever talk to the family yourself?

A. Yes, I did.

Q. Prior to the arraignment, the day of the arraignment?

A. I am not sure.

Q. Did you ever tell him that they could visit?

A. I am not sure.

Q. Did you ever tell them they could not?

A. No, I did not.

Q. Sir, you say he was allowed to make telephone calls?

A. Yes, sir.

Q. When did me make any telephone calls, if you know?

A. On the day of the arrest, that evening, he made telephone calls, and I don't know if he made some the next day or not.

Q. Excuse me. The day of the arrest he made telephone calls?

A. Yes.

Q. You saw him holding the telephone or going to the telephone or whatever?

A. Yes.

Q. About what time was that?

A. Late in the evening.

Q. After ten p.m.?

A. I think so.

Q. Did you at any time tell him that he could not make telephone calls?

A. No, sir.

-133-

Q. Did you at any time tell him that -- strike that. Did he ask for a lawyer at any time?

A. On the date of the arraignment?

Q. On the date of the arraignment.

A. Yes.

Q. That is the first time that you heard him request a lawyer?

A. I suggested that he fill out the petition?

Q. Is that the first time you heard him request a lawyer, the date of the arraignment?

A. Yes, sir.

Q. And, sir, did you at any time tell him you don't need a lawyer, we can handle it for you, we will do better than the lawyer?

A. No, sir.

Q. You never told him that?

A. No.

Q. Did you ever hear anyone tell him that?

A. No.

-178-

BY MR. SELLER:

Q. At any time prior to the third or rather the last statement taken from Mr. Jackson, it would be, I think, the third statement -- no, fourth state-

ment, the third taped statement -- at any time prior to that did he say anything or did anyone say anything about the possibility of his working out some kind of a deal with the prosecutor or the prosecutor making him an offer?

A. No, sir.

-179-

Q. Did Mr. Jackson raise any questions about that in any way?

A. Yes, sir.

Q. Where and when?

A. That would have been approximately ten-thirty on the 1st. That would be after the second taped statement.

Q. Who was present at the time?

A. Myself and Sergeant Garrison, perhaps Sergeant Hoff.

Q. Where were you?

A. In the conference room in the lower level of the police station.

Q. What did Defendant Jackson say?

A. He asked me what was going to happen now.

Q. What did you say?

A. I told him the itinerary. I told him in the morning I would prepare a warrant request, submit it to the Prosecutor's Office, that he would be taken to court the next afternoon, that I felt confident that the prosecutor was going to issue a warrant for murder, conspiracy to murder, and felony firearm against him and another defendant, and that he would be taken before the court for arraignment. At that arraignment he could petition the court for a court appointed attorney, and after the arraignment the court appointed attorney and the prosecutor would get together and discuss the case.

ROBERT JACKSON (26 NOVEMBER 1979):

-464-

Q. Now when you got back to the station, did there come a time when you were arraigned?

A. Yes, there did.

Q. At that time, when you were arraigned, was there any mention of what rights you had?

A. Yes. I had the right to an attorney.

-465-

Q. The answer is yes?

A. Yes, there was.

Q. Okay. Did you have an attorney at that point?

A. No, I didn't.

Q. Now did there come a time after August 1st, 1979 when you gave another statement? On August 2nd, 1979 did you give a statement on tape?

A. Yes, I did.

Q. During that statement was there a mention of what your rights were?

A. Yes, there was.

WAIVER-TRIAL COURT'S OPINION (28 NOVEMBER 1979):

-705-

THE COURT: All right, gentlemen, thank you very much.

I want to thank all counsel, first, for their very able presentation of the testimony and able argument in this matter.

I think these are both difficult things to decide. I am going to deal with Mr. Jackson first.

Now, basically, it is argued by Mr. Willis that I should believe Mr. Jackson and what he said, which he said many things that directly contradict what the police officers say, and that if I believe what he says, then his statements should be, we are talking about five statements here really, should be excluded, and that I can also assume, as a Judge, that because of what we heard on the tape relating

-706-

to Mr. White from one-thirty to three-forty or one-fifty to three-forty, that a similar type of interrogation in another room was taken which would cause Mr. Jackson's statement to be inadmissible.

Well, with reference to the latter, I can assume nothing. I have to go upon the testimony or record made before me, and the testimonial record made before me with reference to Mr. Jackson shows no such interrogation nor is there any discussion of it in Mr. Jackson's testimony.

Now let's look at what happened here. The first thing is the statement of three-thirty. Sergeant Ericson testified that Miranda warnings were given to Mr. Jackson in the car on the way back. This was also testified to by Mr. White. Mr. Jackson denies that they told him anything about his rights in the car. I disbelieve Mr. Jackson on that. I think it is absolutely clear that in the car Miranda rights were given. Sergeant Ericson says so, Mr. White indicates the same, and also it seems to me that any experienced police officer today, Miranda having been around as long as it has, who didn't give in a case where First Degree Murder charges were made Miranda warnings in a car after they had arrested the person, would not be a very bright police officer.

Sergeant Ericson then testified that once they got into the station, and after Miranda warnings

-707-

were given -- incidentally, the record also reflects in one of these transcripts that there had been three times that Miranda warnings had been given before the interrogation, the first taped confession at five-twenty, and I refer specifically to page one of Exhibit Five, the question on the tape of five fifty-two,

> "Q. Mr. Jackson, you have been informed three times previously advising you of your rights, once when we initially picked you up at the Detroit Police Department, do you remember that?
>
> A. That's right.
>
> Q. And when we first came to this conference room?
>
> A. That's right.
>
> Q. And at five-oh-two p.m. rather you again were warned, this time in writing of your rights?
>
> A. That's right."

So I think there is no question but what he was given Miranda warnings before any type of statement was taken.

Sergeant Ericson testified that after they got back and told Mr. Jackson what they had, that Mr. Jackson said, "Well, I see how things are going. You have got Knight." He said he and Mr. Knight had met

-708-

with Mrs. Perry, that they arranged the plot and money exchanged hands and so forth and he goes on and gives some statement at that time. That was fairly shortly after he was brought into the police station because the testimony is fairly undisputed that he was not taken into custody in Detroit until around two o'clock, and certainly you could say that from two o'clock -- it takes almost thirty to forty minutes to get to the Livonia police station from downtown Detroit -- so clearly there was Miranda warnings given then. That statement, I think is no question but what he said at three-thirty is admissible, constitutionally admissible, and so the statement of three-thirty I will admit. I find that it was said, and you of course at trial may attack the weight and credibility of it to your heart's content.

Now the next statement is the five-oh-two confession.

It is the testimony of Mr. Jackson that the first thing he asked when he got to Livonia was that he have a lawyer, and that he was for the first time given his rights at the time of the tape recording at five-oh-two. Well, I think that is clearly

disputed by his own statement on the tape recording plus the surrounding circumstances.

Mr. Jackson says that -- he testifies that they did not strike him, but he says, when he was there, before he gave the five-oh-two statement, that he heard

-709-

someone being beaten in the police station and that he heard screaming and he feared for his own life. This is one of the reasons he decided he had to give the statement. I disbelieve that completely. There is absolutely no evidence in this record to support anything like that from any other witness or from Mr. White, who has testified rather fully.

Therefore, I feel there were no improper, from the testimony of the officers, no improper representations, coercion, promises of any kind made prior to the five-oh-two confession, Exhibit Number Five. I think proper warnings were given. I think this statement is voluntary. I will admit People's Exhibit Five, the statement of five-fifty-two by Defendant Jackson. You may, of course, in trial attack its weight and credibility as you can with all statements.

The next one we have is the statement of eight forty-eight in which he was asked, because of the bad quality of the first tape, if he would repeat the recorded statement.

The testimony of the officers is that at that time they asked him, explained that to him. Defendant Jackson claimed that he made these statements because of promises for Second Degree Murder and would get favorable reports from the parole officers. He says this was made

before the first and the second tape, as I recall his testimony, at least before the first tape.

I note in each tape of the three taped confessions we have that he was asked every time if there is anything he wanted to add to this tape. He was asked every time if he had been promised anything. In each instance, except in the last tape, he said no, and I will deal with the last tape later. In the last tape he made an equivocal answer in which he said, on page thirty-one, and that is Exhibit Thirteen, I am sorry, Exhibit Seven on page thirty-one, in which he said, "No, nothing has been actually guaranteed but it has been said um that, that something may be, may be able to be worked out afterwards with my truthful testimony about my part in this killing." That is the only time in any one of these tapes that he makes any reference whatever to any representation. The explanation is well, that he was set up, he had been told to do that, and therefore he said no. However, if it had all been set up as claimed, he certainly did not

hesitate to say that in the tape of August 2nd at ten twenty-four a.m.

I think there were adequate warnings given for the eight forty-eight tape, which was basically a repetition of the five-oh-two tape because of the defect in the tape recording. I think the Constitutional rights

were fully protected of Mr. Jackson, and I will receive the eight forty-eight confession, which is Exhibit Six I believe.

The next matter that comes along relates to the polygraph. The police had a different story from Mr. Knight. Mr. Knight had said that Jackson was the shooter and that White was with him, as I recall, but with reference to Jackson, he definitely said so. Jackson had said in his three statements up to that point that Knight was the shooter and he had gone along. At that point he was asked to take a polygraph, and he was taken to the Michigan State Police Post.

I think here the testimony of Lieutenant Romatowski comes in issue. Lieutenant Romatowski testified that when he arrived there at ten a.m. that first he advised him that he did not have to take a polygraph, and I find that to be true, that the defendant gave him his permission to take it, and then advised him of his Miranda rights and made him write them back.

He asked him about his health and made a determination that he was in proper physical condition to take the polygraph test. He then took the polygraph test, and Romatowski found deception and told him that the polygraph test showed deception, showed that he had lied, and suggested it would be a good idea for him to tell the truth. He then told Sergeant Hoff that the defendant had flunked the polygraph test and that the defendant had told him that he

wanted to tell Hoff the truth. He thereupon was given his Miranda warnings and gave a written confession at twelve-thirty, which is Exhibit Thirteen I think but I am not sure of the number, something like that.

Now Jackson's version is that he continued to ask for an attorney, and I don't find that to be true because not on any of these papers, any of the written documents, is there an indication of a request for an attorney, and that on the way to the Michigan State Police Post that Sergeant Hoff had said, if the defendant made a statement implicating White, he could have a Second Degree Murder. I do not believe that, and not only because I find Mr. Jackson to be an untruthful person in observing his demeanor on the stand, but it just doesn't make sense because if he was going to go for that deal, why did he then lie on the polygraph and say that it was Knight and it was him?

I think there is no question but what the statement at twelve-thirty, which was written out, signed by the defendant, was given after full warning of the rights, and the fact that a polygraph test had been administered does not invalidate a confession which is voluntarily made. There is ample authority on that, and the thing is to look to see if there has been overwhelming force or overwhelming psychological pressure, but the mere use of polygraph testing does not exclude a confession. I cite for that Professor George's

work on Michigan Criminal Procedure, Volume I, Section 3.15(A), page 3.15-3, citing State vs. Clifton, 271 Or. 177, and State vs. Iverson, 225 N.W.2nd 48. Of course, the question again remains voluntariness, proper protection of Constitutional rights. I think there is no question of what the statement of twelve-thirty on August 1st is admissible constitutionally and it will be received subject to the usual cross-examination on weight and credibility.

Finally, we come to the statement of August 2nd at ten twenty-four a.m. at which time Mr. Jackson was taped as to -- was put on tape again as to the changed story he had in which he implicated himself and implicated Mr. White. Mr. Jackson says that after he gave the August 2nd statement that the police wanted a statement from White and wanted him to get White

to cooperate, and then he talked White into making a written statement.

I cite this only to show why I disbelieve Mr. Jackson's testimony because the facts of the matter are that Mr. Jackson's August 2nd statement came after Mr. White -- given long after Mr. White gave his statement, which was on August 1st, so I find little or no credibility in the testimony of Mr. Jackson.

I think there is no question again but what proper warnings were given at the August 2nd ten twenty-four confession. I find them the testimony no improper

-714-

threats, promises or denial of rights there, and I will therefore receive Exhibit Seven, which is the confession of August 2nd at ten twenty-four against Mr. Jackson. Of course, you may attack weight and credibility.

SGT. S. GARRISON (7 JANUARY 1980):

-92-

Q. Okay. And a lawyer was appointed for him when, what date?

A. When he requested an attorney.

Q. My question is what date was a lawyer appointed for him?

A. I have no idea, sir.

Q. The first you knew that one had not been appointed for him was as of August 2nd, didn't you?

A. I had no idea if one was appointed that day or not, sir.

Q. As of let's say twelve o'clock - one a.m. on August 2nd, no lawyer had been appointed for him?

A. Again, I would have no idea, sir.

Q. You had no idea. I see. You didn't see one come there and request to see Mr. Jackson, did you, to the police station, as of August 2nd, 1979?

A. I don't believe so, sir.

MR. WILLIS: Would the Court take judicial notice of when a lawyer was appointed in this case from the file?

THE COURT: I think we can. I have to look at the file.

Well, according to the records I have -- wait a minute. No, that's not it. According to the records I have, the requesting date for the appointment of a lawyer was August the 2nd, 1979, and that you were appointed --

MR. WILLIS: (Interposing) Not me, Your Honor. I think there was one before.

THE COURT: Was there one before?

MR. WILLIS: A lawyer before.

THE COURT: I am not sure. The request date on all the requests for appointment were August 2nd, so it was obviously August 2nd or thereafter that a lawyer was appointed.

MR. WILLIS: Thank you, sir.

For the jury's edification, I wonder if the court might tell us what is meant by a request when we say a request.

THE COURT: The paper I am referring to is a paper signed by the Chief Judge of this Court, in which on August 2nd asking -- referring the matter to another Judge of this Court for appointment, in accordance with our customary procedure of circulating all appointments among Judges, to another Judge of this Court, asking for the appointment of a lawyer for Robert Jackson. That went out sometime on the 2nd of August.

There is an indication here that the examination was to take place on August 9th, but it does not show the date of the appointment. The request went from the Chief Judge to the Judge who made the appointment on August 2nd, so it was probably after August 2nd.

SGT. W. HOFF (10 JANUARY 1980):

Q. Sir, let me ask you this. Did Mr. Jackson ask to have a lawyer at any time that you know of?

A. No, sir, he did not.

Q. Did Mr. Jackson at anytime that you know of say I don't want to talk to you?

A. No, sir, he did not.

Q. Because if he had, you would have stopped, is that right?

A. Yes, sir.

Q. Is that because that is what you are supposed to do?

A. Well, we would have made arrangements for him to obtain an attorney and cease or terminate the interview; yes, sir.

Q. Well, that means that that is what you are suppossed to do, is that correct?

A. Well, that is what we would -- we were supposed to have done and also from the fact if he had made that request, it would not have been admissible anyway.

Q. So that's what you would have done?

A. Yes, sir.

MR. SELLER: Oh, yes. There is a portion of the tape in which Lieutenant Campbell was talking to Mr. White.

THE COURT: I know.

MR. SELLER: Neither Mr. Jackson was present nor Sergeants Hoff or Garrison. Is defense counsel requesting that we also play that portion?

MR. WILLIS: Yes, sir, because that is --

THE COURT: (Interposing) That doesn't have anything to do with Jackson, does it?

MR. WILLIS: It does. I am saying to this Court also, all the things I have said, that one of them is it is showing their whole scheme with respect to this case, how they were coercing people in some subtle manner to give statements, and they even made the Mutt and Jeff routine. I asked that question, if the Court will recall, of Sergeant Ericson. I thought of Sergeant Garrison. I don't know if I asked it. Didn't you play the good guy-bad guy routine, you know what I mean, Mutt and jeff in this case, wasn't that part of your plan and scheme.

THE COURT: I think the Campbell thing is all right unless there is polygraph in it. I don't think there is.

MR. SELLER: If there is, we can excise it.

THE COURT: All right, bring the jury.

(Defendant Jackson's jury returned to the courtroom)

THE COURT: You can proceed, Mr. Willis.

MR. WILLIS: Thank you, sir.

At this time, Your Honor, I will move on to something else.

THE COURT: I wish you would.

MR. WILLIS: I just wanted to say that in front of the jury for continuity.

BY MR. WILLIS:

Q. Now, Sergeant Hoff, you conducted the interview of Robert Jackson on August 2nd, 1979, is that right?

A. Yes, sir.

Q. Now you stated that Mr. Jackson wrote out something on August 1st, wrote his name across it, that item that has

been introduced in evidence, wherein he said he shot Mr. Perry, right?

A. Yes, sir.

Q. Now it was after that that you started talking to him about what kind of -- what was going to happen to him, is that right?

A. Yes, sir. You are referring to the conversation --

Q. (Interposing) On the way back.

A. Yes, sir.

Q. Now he had already given statements before that, obviously, we have heard them, but he hadn't been offered anything, at least up to that time, if he ever was, he had not been offered anything, right?

A. That is correct, to my knowledge.

Q. Now, sir, when you conducted the August 2nd interview with Mr. Jackson, you first started out by giving him his rights, didn't you?

A. Yes, sir.

Q. And, of course, during that you told him he had a right to a lawyer?

A. Yes, sir.

Q. You have told him that before?

A. Yes, sir.

Q. Did he at any time say I want a lawyer?

A. No, sir.

STATEMENT OF ROBERT JACKSON (8-2-79):

OFFENSE: HOMICIDE.

Hello Pat, this is Sgt. Hoff, this is a supplement to 79-022458, todays date is August 2, 1979, the time now is 10:24 a.m. and we're in Classroom B-3, lower level of the Livonia Police Department. We will be interviewing a Robert Jackson, with me also is Sgt. Shirley Garrison and Sgt. Richard Ericson. Mr. Jackson just for the record could you indicate your birth date and address into the tape?

A. My birth date is 11-23-52 and my address is 11717 Cascade, Detroit Michigan.

Q. Alright now Robert over the last day and a half or so we've talked with you on prior occasions and we've advised you of your constitutional rights, is that correct?

A. Yes it is.

Q. And at that time you indicated that you did understand your rights and you at that time elected to waive these rights and answer certain questions, is that correct?

A. Yes it is.

Q. Okay I'm going to once again go through your rights and ask if you do understand them now, I'll read them. You do have a right to remain silent, not make any statements or answers nor incriminate yourself in any manner whatsoever. Anything you say can and will be used against you in a court or courts of law for the offense of offenses concerning which any statement is made. Do you understand what I've read this far?

A. Yes I do.

Q. Okay continuing that you can hire a lawyer of your own choice to be present and advise you before and during any questioning and that if you are unable to hire a lawyer you can request and receive appointment of a lawyer by proper authority without cost or charge to you to be present and advise you before and during any questioning. Do you understand them thus far?

A. Yes I do.

Q. And second, or continuing that you can refuse to answer any questions or stop giving any statement any time you want to and that no law enforcement officer can prompt you as to what

to say during this questioning nor write you a statement for you unless you choose for him to do so. Now do

you understand these rights as I've read them?

A. Yes I do.

Q. Now Robert just for the record can you tell us a little about your educational background?

A. Sir I went to McKenzie High School in Detroit, I went to the 11th grade and I had some vocational training, I took a vocational course (inaudible) and basically that's

Q. Okay now you're aware of course that I'm a police officer and these officers are also police officers with the Livonia Police Department, is that right?

A. Yes sir.

Q. Now knowing and understanding your rights ah do you at this time wish to answer any questions that we might ask of you?

A. Yes I am.

Q. Okay now we're going to be discussing an incident that happened the early morning hours of July 12 out in Livonia on Country Club Drive. Before we get into that I want to refer to a conversation I had with you yesterday at the Michigan State Police Post. Do you recall that conversation?

A. Yes I do.

Q. Okay I'm going to show you a copy of the statement which you wrote out and I want you to look at it and recall if you do remember making that written statement?

A. Yes I do.

Q. Okay now that's a statement which is made on a State Police Rights Form which was made to me, Sgt. Hoff, and again at the top of that form is an advisal of your rights, is that correct?

A. Yes it is.

Q. And it was dated August 1, 1979 at 12:27 p.m., there is a space for a signature, that is your signature, is that correct?

-3-

A. Yes it is.

Q. Okay the location was Michigan State Police Crime Lab and could you read into the tape what you did write out for me yesterday?

A. I Robert Jackson was the one that shot Mr. Perry on July 12, 1977 about 4:00 a.m. Mike White was with me, Charles Knight was the one that contacted me about Mrs. Perry wanting her husband dead. I met with Mrs. Perry twice and she made a plan that she wanted her husband dead and didn't care-ah, and did care how. I am making this statement of my own free will and the police have treated me fairly.

Q. Okay and then you signed it with your name Robert Jackson, is that correct?

A. That's right.

Q. And on the lower left hand corner can you read that?

A. Ah yes.

Q. And that says

A. Sergeant a McWilliam Hoff

Q. Abbreviation for William Hoff and I dated that August 1, 79 at 12:50 p.m. On that statement you wrote out yesterday for me, was that the truth?

A. Yes it was.

Q. Had anything been added or changed on that statement to your knowledge or can you see any changes?

A. No I can't.

Q. Okay, the only thing that I would question would, up on the date, you said July 12, and you wrote in what was the year?

A. 79

Q. 1979 alright. Okay now we're going to continue and ask you a few more questions about what occurred that night. Can you tell us how you first got involved in this situation?

-4-

A. Okay I first got involved through Charles Knight, he approached me with a, he came by my house on Cascade and he told me about a lady that he had been talking with for the last couple of days about her wanting, wanting a hit done on her husband and that he had met with her I'd say a couple of times, you know, on the Monday previously and Tuesday maybe by phone (inaudible) but he did make it known that they had met personally and she had took him out to her house, you know, around and whatnot so he could (inaudible) of what she wanted done and what the location was.

Q. Okay now I'm going to show you a photograph of a person, I want you to tell me who that is?

A. That's Charles Knight.

Q. Okay and he's the one that got you involved into this initially, is that correct?

A. Yes it is.

Q. Okay and on the back I'm going to ah write the number, can you read that number?

A. 4A

Q. That's right, so picture 4A is a photograph of Charles Knight, is that correct?

A. Inaudible

Q. Okay could you continue?

A. Okay then from, from there he asked me about you know getting into the job with him, doing the job with him, he asked me how did I feel about it, so I took a little while and I thought about it and thought about it and I agreed to upon talking with her to be sure that everything was the way it was supposed to have been. Okay and this, we called her on the phone, called her at her job, we talked on the phone, she acts, um, has Charles told you exactly what I wanted done, I says yes he has, she said well um has he told you about ah the money situation about the $400.00 that I, that Sylvia has you know towards the job. I say yes he has told me that too and she said well how do you feel about (inaudible) this far. I say well still you gonna have some money regardless of what she has in her hand, that's something that's that's distant, that something I, you know, I have no knowledge of period

-5-

That's you sayin its there, you know, she said well I can, she said I gave Charley 40 bucks and you can get that forty from him and if possible can we have lunch today at 12:00 and um I will add 60 with that and make that an even hundred.

Q. Okay now, this was a conversation you had with her on the phone?

A. That's right.

Q. Where were you when you were making that conversation?

A. I was at the Cascade my Cascade home, my mother's home.

Q. And ah where did you call her?

A. Inaudible

Q. Okay did you initiate that phone call, did you make that call?

A. No, Charles did.

Q. And do you know where he called her at, what number?

A. No I don't know the exact number.

Q. Alright, so you did make arrangements to meet her and did you subsequently go ahead and meet her at that time?

A. Yes I did.

Q. Could you tell us the date, time and location of that meeting?

A. Okay, this was on - this was on the day of the murder - okay it was approximately a quarter to one when we reached Jacobson's in Dearborn cause we had to catch the bus.

Q. Okay now that's her place of employment?

A. That's right.

Q. You took a bus there from your Cascade address?

A. That's right.

Q. And this was the first time you'd met the woman personally is that correct?

A. That's right.

Q. Okay.

-6-

Q. I'm going to show you another photograph here and I want you to look at it and see if you can recognize

A. Yes I recognize the two people in the, the front ground of the photograph.

Q. Can you tell us who those people are?

A. The one on the left is Ms. Millie Perry, the one on the right is Mr. Perry.

Q. Alright, could you, as we turn the picture over you'll notice a number up on the upper right hand corner, that number is what?

A. 1A.

Q. Okay now what happened at that meeting at Jacobson's in Dearborn on, this would be, July 11, just the day of the murder, is that correct?

A. That's right.

Q. Okay, go ahead.

A. Okay ah we went into the store after we got there and we had to inquire because ah we didn't know exactly where she worked at and ah so we were directed to the second level of building, and after we got to the second level, we walked around, we still didn't see her so we had to inquire further. Okay we inquired further then a lady went back in the back, said just a moment and she went back in the back and I overheard her say, its two gentlemen to see you out front, okay, and she came out, say oh, how you guys doin and whatnot so then we proceeded to leave the building through the rear entrance, okay, which is the parking lot, okay, we left there, she stopped at her car for one brief moment while we walked ahead of her and then she came and caught up with us and we walked approximately a block down, across a parking lot to Michigan Avenue and right around the corner to a restaurant.

Q. Do you recall the name of the restaurant?

A. No I don't.

Q. Okay and did you meet and talk with her in the restaurant?

A. Yes I did.

Q. What was the conversation?

A. The conversation was about ah her wanting her husband dead, not beat up, dead.

Q. She was very clear on that point?

A. Yes she was.

Q. Do you remember the exact words that she might have said?

A. Yes, I want my husband dead and I don't care how.

Q. Okay, you remember those words that she told you?

A. Yes I do.

Q. What else was said?

A. Okay, um, it was said that she would take real good care of us guys if we would take care of this job for her because the rest of the money would come off the tail end of the insurance money which wouldn't be but a few weeks after his death.

Q. Did she indicate any specific amount?

A. No she didn't.

Q. In your mind how much did you think that you might get out of this whole incident?

A. Well maybe, maybe 20, 30 grand maybe at the most.

Q. Okay anything else said at that meeting?

A. No, nothing else that had any major significance.

Q. Was there discussion of a rental car?

A. Oh yes that, that was discussed but that, that was, that came up through me.

Q. With her present?

A. Ya with her present.

Q. Was she going to assist you in perhaps renting a car?

A. Ah no I said I would take rr that on mine.

Q. Okay how about a gun, was anything mentioned about a gun at that time with her there?

-8-

A. Um m m, yes, ya, it was mentioned about a gun, what we'd use, it was the most obvious, you know, way of taking care of him.

Q. Did you mention that to her?

A. Yes I did.

Q. Oh, what did you say?

A. I said well I would um, I would, I would shoot him that's the way I would do it.

Q. Okay.

Q. Now was there anything said about a letter that she possibly had written prior describing his movements, ah, physical description, address, etc.? Do you recall?

A. Now, what, but she, she described him anyway, she described him then how he looked, about how tall and all of that but to make sure that ah there wouldn't be any mistake about it she said that she gets off at 5:00 and approximately 5:30 sharp that she would come out on the porch with some green shorts on and ah she made a notion that he liked those particular green shorts and that he would be, she would make sure he would be on the porch with her and for us guys to ride by and we could get a good look at the house and him at the same time.

Q. Okay so all of this was given to you verbally by her nothing in writing at that time is that correct?

A. Yes it is.

Q. Okay now this ah incident on the porch was going to take place at ah about what time that day?

A. About 5:30.

Q. So she expected you to be back there in the area around 5:30 is that correct?

A. Yes it is.

Q. Did you agree on doing that?

A. Yes I did.

Q. Okay, how much more conversation took place at that meeting at the restaurant?

A. Um mm, none, none actually after that we jus, just brief little chitty chatter with Charley.

Q. Did she give you the age of her husband?

A. No she did not then.

Q. Did she at any time tell you how old he was approximately?

A. Ya, ah mid forties.

Q. Okay, so you feel you had a pretty good description of ah who the man was, did you know what bedroom that he used at that time?

A. No I didn't.

Q. Okay, ah that meeting, ended, is that right, a short time later?

A. That's right.

Q. As far as the money at that meeting, you obtained how much more?

A. Sixty dollars.

Q. That sixty dollars was the first money that you had actually received on this?

A. Right, directly from her.

Q. Did you split the money with anyone?

A. Yes I did.

Q. And who was that person?

A. Charles Knight.

Q. Gave him exactly half?

A. Yes I did.

Q. Then what happened?

A. Then we proceeded to catch the bus back, -- I stopped and made a phone call about the rent-a-car to see if I could have it delivered and they say that they didn't have anyone available with them to bring the car, that I would have to come in or they had another subsidiary office not too far from where I was and I could possibly contact them

and they may have something that they could you know deliver to where I am. Okay I called them and they said everything they have was on in the street so I, they directed me back to the Livonia Office so they again told me the same thing, that they didn't have anyone available there to come and bring the car with them, there was no problem about me renting one if I could get there.

Q. What Agency did you call?

A. American Rent A Car.

Q. They're located where?

A. On Plymouth Road in Livonia.

Q. Okay you subsequently did get a car ah is that correct?

A. Yes I did.

Q. Can you tell us about that car?

A. Well the car was a gray, 79 Volare with red interior.

Q. What time did you pick that car up?

A. Approximately about, all, almost right at closing time, 6 o'clock.

Q. And how did you make arrangements to pay for the rental of that car?

A. Um with, ah with the other half of the sixty dollars that I got from Mrs. Perry.

Q. You gave them how much do you remember?

A. Ten dollars.

Q. Okay. Who was with you when you were renting that car?

A. Charles Knight.

Q. Okay after you rented the car, you picked it up at what location?

A. Ah at the Plymouth address in Livonia.

Q. Okay then what happened?

A. And then we left and we rode by the house and then we proceeded and came back to Detroit, went to the (inaudible) and called her again, then okay it had rained so

that had made the, ah, initial you know meeting as far as riding by to see him on the porch that had just you know knocked all that out cause it had rained.

Q. Now when you went back to the house, how did you know how to get to the house? At that point?

A. Well let's see, pre, Charles had already met with her, you know previously and ah he had already been out to the house so he knew exactly where it was.

Q. So you were driving and he was the passenger?

A. Yes he was.

Q. And he directed you to that house.
?

A. Yes he did.

Q. I'm gonna show you a photograph and I want you to look at it and see if you can recognize what's in it.

A. That's the house.

Q. Okay that's the house on Country Club where the Perry's reside is that correct?

A. Yes it is.

Q. Turn the picture over and you'll notice the number on that photograph and that number is what?

A. 2A.

Q. Number 2A, okay. What happened then?

A. Okay we got, we went back home and we called her, for ah, for an additional meeting cause we had to talk then, okay, then upon calling her we found out that he had drove a companies car home and that he was ah gonna take ah, take a trip the next morning. Okay, so initially the way she had it planned at first was to, you know, put her car behind his in the garage and make sure that he would have to come from the garage so that would be the initial place where the murder would take place, would have been in the garage. Okay now that made that impossible now, by the company car being parked directly in front of the house so um she said I'll meet you guys in the parking lot of the Mall on ah I forget the

street, it was at Newburg Road or something there.

Q. Do you recall the name of the store?

A. Ah it was a Great Scott, I do know.

Q. Okay there is a Great Scott at 6 Mile and Newburgh would that be the location?

A. Yes it is.

Q. Anything about the roads in that area that might, you might recall?

A. Yes there was ah, construction on the roads.

Q. Okay so you did meet her at that location, what would the time be approximately?

A. Ah, I'd say about 9:30 or so because it had just gotten night.

Q. Okay and we're still talkin about July 11th.

A. Inaudible

Q. Just a continuation of the same day that we've been discussing, is that right?

A. That's right.

Q. When you met her there what happened?

A. Okay she proceeded and then, you know did beck for us to follow her and we left that Mall and went down to another one not too far away maybe about a half a mile, a mile or so down the same road, Newburgh Road.

Q. And this would have taken you to ah Five Mile and Newburgh is that correct?

A. Okay.

Q. Do you recall a store in that area, a major store?

A. No, not, not in (inaudible) recognize or recall but it was a mall.

Q. Okay now what happened there?

A. Okay there is where I parked and to me, me and Charles got out of the car and we got in her car with her, I locked the rented car and we rode, rode around and proceeded to talk further on.

Q. Okay now when you rode around with her where were you sitting?

A. In the front seat.

Q. And was Charles Knight with you?

A. Yes he was.

Q. And where was he?

A. In the back seat.

Q. Did you continually drive around or did she park the car and talk or what?

A. No its continually drive around.

Q. How long were you in her car?

A. Maybe a half hour, 45 minutes at the longest.

Q. And during this time what did she inform you?

A. She informed us then that he had brung the rental car home and that you know, and that she had asked him, you know, how come he wasn't gonna use his own car and he said because why should I use my own when I can use the company's gas and the company's car and whatnot so that was the, that was the reason for us having another meeting to set something else up.

Q. Did anything else that she told you as far as the, the plans for perhaps that evening?

A. Okay she said ah one way we could do it would be to get him on the front porch on his way out, or at Northland at his place of business in the morning or number 3 on the road when he initially left to take the trip because he would always have to stop and take a leak at the first rest stop, that's one thing we can bet on.

Q. Was she pretty much leaving it up to you as to how and where and when you were going to do this?

A. Yes she did.

Q. At this time she knew that you were going to be the one that, to do this?

A. Yes she did.

Q. Did she know that Charley ah would not be there that night? At this time?

-14-

A. No she didn't.

Q. Okay so was there anything else that was brought out during that conversation? At that time?

A. Ya as about the ring and the watch, you know, she says a couple of more little goodies now will just go right in with it because I wouldn't want them (inaudible).

Q. For her to mention that she must have assumed that you would be breaking into the house or coming into the house, is that right?

A. Ah no not in, not in particular (inaudible) that she would just get that concealed and you know bring it out on her own some type a way.

Q. Alright so after this took place she would just give this to you at a later time.

A. That's right.

Q. Okay, so is there anything else that came out of that meeting?

A. Mmm no basilly, basically she was, she was thinkin that we were gonna do it by gettin him in the morning when he left out of the house to leave.

Q. Okay. Was there any indication by her that there was a certain deadline that had to be met for this thing being done?

A. Yes it was.

Q. What did she say about that?

A. She said ah she had divorce proceedings and they would become final sometime in August and that at that time she would not receive the type of insurance money that she was hopeful that she would get after this was taken care of so she wanted it done at least by August but preferably before the end of that week.

Q. Okay and then of course she was aware of a trip that he was about to go on is that right?

A. Yes it is.

Q. She told you about that trip?

A. Yes she did.

Q. So that would have pushed it up into ah to hafting, to having to be done that night is that

-15-

right?

A. That's right.

Q. She knew it was going to be done that night?

A. Yes she did.

Q. Okay so did she take you then back to where your car was parked?

A. Yes she did.

Q. Then what happened?

A. And then she left, pulled off and I left and pulled off and headed back to Detroit.

Q. Was it that time that you went by the house or you had already been by the house once you figgered you knew where it was?

A. Right.

Q. So you headed back to Detroit, ah did you go back the Expressway?

A. Yes I did.

Q. Okay.

Q. What happened when you got back?

A. So when I got back I dropped ah Charles off at home, oh before I got home I stopped by Michael's house.

Q. Okay and for what purpose?

A. Ah the purpose was to see if he had ah a gun that I could use.

Q. Now you say Michael, who are you talking about?

A. Michael White.

Q. I'm gonna show you another photograph and see if you identify this person.

A. That's Michael White.

Q. Okay I'm gonna reverse the picture, I'm gonna number it I want you to tell me the number on the photograph.

A. 5A.

Q. Okay photograph #5A on the back is Michael White is that correct?

A. Inaudible

Q. Okay what did you tell Michael White?

A. I told him that I had a job up and that I would need a gun and asked him did he have one available, preferably a big ah, a big caliber gun preferably.

Q. What did he say?

A. He said that he did not have a big caliber gun but he thought that he could get one by the time, you know by that next morning, thought we could come up wit[illegible] one. Okay at this time Charles Knight did not know that Michael was gonna be the one that was gonna go with me, he stayed in the car, I went in the house and talked with him.

Q. So at this time Charles Knight was still in the car out in front of White's address?

A. That's right.

Q. And at this time did you know that Knight would not be going with you that night?

A. Um yes, now, no no, not, not this, on, on my way to droppin him home that's when you know I really got him on the close sqidgy about you know whether or not he really wanted to go through with this or not.

Q. And what did he tell you?

A. He indicated that he didn't.

Q. Did not want to go

A. That's right.

Q. with it. Alright going back to a conversation you had with Knight, did you ever get anything resolved during that conversation about a gun?

A. With Knight?

Q. I'm sorry with Michael White.

A. Okay no, it was um, I was supposed to call him back a little later on, he would, you know, let me know by the time I got home, he was gonna make some phone calls.

Q. Okay you were aware that he had a gun, though, is that right?

A. Ah yes I was.

Q. Had you ever seen that gun before?

A. Ah yes I had.

Q. Okay now he subsequently did come up with a gun, is that right?

A. That's right.

Q. Now if I showed you a gun do you think you could ah identify it as possibly being the gun that you used that night?

A. Yes I think so.

Q. Okay I'm going to show you a gun, ask you not to touch this gun it hasn't been checked at this time for prints. I want you to look at this gun and tell me what you see.

A. Yes that looks like the weapon.

Q. Alright and can you describe it on tape as to what type of gun it is?

A. It's an automatic and its ah, a real small handgun with ah, a gray steel, it has black ah would you call that black,

Q. Grips.

A. black, ya okay on each side.

Q. Okay and what you're describing here is a .25 caliber Colt Automatic. Ah is this the gun that you used to kill Mr. Perry that night?

A. Yes it is.

Q. Alright. This is the gun that Michael White gave to you, is that correct?

A. Yes it is.

Q. Okay now when you left Michael White's house you did not leave with the gun is that right?

A. That's right.

Q. Can you tell us what happened after you left his house?

A. Then I went home, I dropped Charles off on my way home, then I went home, then um I'd say

maybe about an hour or so he called and said that um it looked kind of, the chances were slim of getting a bigger caliber of a gun but he did have one available.

Q. And that was the gun I just showed you?

A. Yes it is.

Q. Did he tell you the caliber or anything about the gun?

A. Um yes (inaudible) yes.

Q. What did he say?

A. He said it was a 25 automatic.

Q. Okay now you knew at this time that Charley Knight would not be going out with you and did you ask Michael White then? To go with you?

A. Yes I did.

Q. He agreed?

A. Yes he did.

Q. And you later got in contact with him?

A. That's right.

Q. And how did that happen? Did he meet you or did you pick him up?

A. No he met me, he came over to my house at the Monica address.

Q. Okay what happened then?

A. Okay when he came over to the house then that's when we go ah decided that it would be it would be more to out best of interest to just B & E the house and go in and murder Mr. Perry then to do it outside of the house.

Q. Okay now what time did he get over to your house on Monica?

A. Oh maybe about 12:00 (inaudible).

Q. And after discussing it with him um you decided to make the hit earlier than had initially been thought?

A. That's right.

-19-

Q. Why was that?

A. Because we had thought that if anything, that if it, that if she had ah, that if Mrs. Perry had any type of screw-ups in the fire for us that we would catch it all by surprise.

Q. Okay, we're gonna reverse the tape and ah continue on the other side.
Sgt. Hoff. The time now is 10:53 a.m.

(Side B of Tape)

of tape, the time now is 10:54 a.m.

Sgt. Hoff. Just to go back to when Michael White came to the Monica address he did have the gun at that time, is that right?

A. That's right.

Q. Okay so you left that address to head out to Livonia at about what time?

A. Approximately like 2:00 or so.

Q. How did you go out to Livonia?

A. An in the rent a car.

Q. And you used what route?

A. Um Expressway, Jeffers.

Q. Okay when you got into the area of the Perry house ah can you tell us ah what you did as far as the drivin around?

A. Okay we drove through the neighborhood once and looked at the house and see how the neighborhood is set up, okay, I parked on Curtis at first and then we thought that that wasn't such a good idea, two blacks in the evening walking any type of distance, you know, in that type of neighborhood, so we both decided to park the car as nearest the house we could and but not directly in front of the house so we parked about 3 houses down from the Perry house.

Q. Okay now from the time that you got into the area until you parked 3 houses down from the Perry house, how much time had you spent lookin the neighborhood over?

-20-

A. Oh maybe about a half hour, 45 minutes.

Q. Initially had you parked right in front of the Perry house?

A. No.

Q. Is there any street lights in the area?

A. Yes there was.

Q. Okay but the area you parked would you, was it near a street light or away from a street light?

A. Okay ah, the, the company car they have was parked directly up under the street light so that put us just a little bit away from - from the street light.

Q. Okay when you say 3 houses away are you talking ah towards 6 Mile?

A. Yes I am.

Q. So we're saying south of the house and you parked properly, not facing traffic but you pulled the passenger side of the vehicle to the curb, headed in a northerly direction, would that be correct?

A. That's right towards the curb.

Q. Can you tell us about his company car in front of the house, what type of car it was if you remember?

A. Okay it was ah, ah powder blue lookin, was brand new I believe maybe a Pontiac or somethin maybe a Chevy, ah (inaudible).

Q. Okay, when you went out to that house ah did White give you the gun or did he carry the gun?

A. Ah he gave the gun to me.

Q. When did he give it to you?

A. Um when we left my house.

Q. and you carried it on your person?

A. Yes I did.

Q. Whereabouts did you carry it?

A. In my pocket.

Q. Pants pocket?

A. Yes.

Q. Was it loaded?

A. Yes it was.

Q. Why did you carry the gun?

A. There's no particular reason why because I was gonna be the one that was gonna initially kill him.

Q. So that had been decided by you and White at your house on Monica or even prior to that? Possibly?

A. No it was at my house on Monica.

Q. Alright what were you wearing that night?

A. I was wearin black trousers, a black sweater and the shoes that I'm presently wearing now which are some hush-puppy style, kidd skin on the top, ruffle bottom.

Q. Okay do you recall what Michael White was wearing?

A. He was wearing ah black trousers and if not mistaken a black shirt.

Q. Did you have anything for your hands?

A. Yes I did.

Q. Could you tell us about that?

A. I had on socks ah to cover my hands and he had on black leather gloves.

Q. During the entire time that you were in the location of the house did you wear those socks on your hands?

A. Yes I did.

Q. Did you ever take them off?

A. No I didn't.

Q. In fact even when you shot that gun did you have the socks on your hands?

A. Yes I did.

Q. You were still able to shoot it?

A. Yes I was.

Q. Okay, after you parked the car south of the address, Perry address, what happened then?

A. Then we proceeded out of the car up to the house through the side where she had left ah the garage door open, this was talked about earlier too, and we proceeded through the garage door upon which we found the other door that leads directly into the house was locked. Okay then neither one of us, we didn't bring any type of burglar tools or whatever because it was

initially planned to get him on the outside of the house so we know we wouldn't need any type of burglar tool. Okay so we found it that way and we had planned on breaking in we had to look around for something to use to pry into the house with, so which made using, you know, using the light periodicaly you know to look around upon which Michael found a screwdriver-kay - then I was initially doin most of the watchin out while he was doin the pryin on the door. Okay after pried on the door some and then he came back to the car, you know peekin in into his car and he started gettin in with the with the door with the screwdriver upon which the window shattered and the window whattered, he opened up the door and got in and proceeded to take out the, the stereo tape head and C.B.

Q. How long do you think you were in that garage totally?

A. Mmm mm maybe about ah about a half hour.

Q. Now Mrs. ah Perry does have a dog was there any preplanning done about ah that that dog?

A. Not that I can recall, no.

Q. You didn't hear any dog barking during all this did you?

A. No I didn't.

Q. Okay eventually you did open and pry that door, is that correct?

A. That's right.

Q. Any other tools used besides that screwdriver you mentioned?

A. No there wasn't.

Q. Okay now did he remove or you remove that article from that car that the window was broken?

A. Yes.

Q. What, what is the article?

A. It was ah, a C. B. and ah ah Cassette Tape Recording.

Q. Do you know the brand names?

A. Um mm no not right off hand, no.

Q. Okay, now where is that put ah when you went into the house?

A. It was put beside the garage door.

Q. Outside?

A. Inside.

Q. Okay once you entered the house can you tell us what happened then?

A. Okay after we entered the house we took ah a brief look around the ground floor to make sure no one was around, lyin on the couch or anything and no one was, then we proceeded up the stairs.

Q. Okay when you went into the house who was first?

A. I was.

Q. Where was the gun at this time?

A. It was in my hand.

Q. Okay are you right handed?

A. Left.

Q. Was it in your left or right hand?

A. Left.

Q. Left hand. You proceeded up the stairs to the upper level of the home?

A. That's right.

Q. What happened then?

A. After we got the stairs, um Michael started searching one end of the upstairs and I started on the other to try and locate Mr. Perry in the house.

Q. Okay and ah had you checked any bedrooms yourself?

A. Yes I had.

Q. Was there anybody in the bedrooms you checked?

A. ah nnn no, there wasn't any in the first room I checked but when I went to check the second one that's when

Michael ran across Mr. Perry into the second room that he had checked. Okay, and Mrs. Perry was in the room that I was about to go in when Mr. Perry you know ah got up out of the bed, Michael jumped back out of the door.

Q. Okay now when that happened you apparently were made aware of this by some noises.

A. That's right.

Q. Tell us about those noises.

A. Okay ah um Michael jumped back and sort of pulled the door back to and ran back towards the steps, down the steps. Okay which I done the same thing, I pulled the door to, the door that I was initially going into when I, you know, when I heard the noise then I backed down the steps too. Okay at that time Mr. Perry stuck his head out of the door and looked down the steps and hollered, get out of hear, in a real loud forceful voice.

Q. Now for you to walk down the steps you would have had to walk almost in front of Mr. Perry's bedroom door is that right?

A. Yes that's right.

Q. Now when you did walk in front of that door was the door closed?

A. Ah no it was sort of ajar.

Q. Was the light on inside his bedroom?

A. Ah no it wasn't.

Q. But you knew he was awake and you knew that he was in that bedroom?

A. Yes I did.

Q. So as you were goin down the stairs ah you say he poked his head out behind the door?

A. That's right.

Q. And yelled at cha?

A. That's right.

Q. He yelled again what?

A. Ah get outa here.

Q. Okay what happened then?

A. And then I got off a shot at him then.

Q. Okay do you think that shot ah hit him?

A. I couldn't be sure.

Q. Then what happened?

A. And then I proceeded back up the steps, into the bedroom, which he was in. I fired 3 or 4 times, he fell hit the floor, I turned around came back out that (cough) came back out of that room, I grabbed, I grabbed the black leather, you know, case that was on the on the stand there and I throwed

that to Michael and I ran down to the room that I was, had previously, was going into, when, when I discovered the noise from Michael at the other end. Upon goin in that room Miss Perry was in there.

Q. Okay just to back up a little bit now, when you went into the room that Mr. Perry was in was the light on in that room?

A. Okay I can't remember whether I turned the light on or he did or not, I can't I can't actually remember.

Q. The light ended up being on is that right?

A. Yes that's right.

Q. Because you were able to see that black plastic pouch?

A. Right.

Q. Ah prior to goin out there when you had that gun, did you check that gun to make sure it was loaded?

A. Yes I did.

Q. It apparently was loaded?

A. Yes it was.

Q. Do you recall if there was one in the chamber?

A. Ah yes it was.

Q. Okay so you didn't have to slide or cock that gun prior to this?

A. No.

Q. How many rounds did that gun hold?

A. About 6 I think.

Q. Okay it holds 6 rounds, to your knowledge? But when you were firing the gun did you ah hurriedly fire all the rounds do you know?

A. No.

Q. Now when you went into the room after you'd fired that first shot at him did he appear to be injured or hurt at that time?

A. Um I, I couldn't be sure.

Q. The second shot ah where was he standing when you fired that one?

A. He was backing up towards the window, had his back up towards the window.

Q. Was he in front of his bed or along side his bed?

A. No along side.

Q. Okay did you fire any of the weapons when he was lying on the floor?

A. Ah yes.

Q. How many rounds did you fire into him when he was lying on the floor, do you remember?

A. Ah no, I can't remember.

-27-

Q. Was he breathing when you left that room?

A. I couldn't be sure, I didn't go up and inspect the body after I shot.

Q. Okay after you shot him how long do you think you stayed in that room with him?

A. Ah approximately ah half a minute maybe if that long.

Q. Okay, and this was when the light was on?

A. That's right.

Q. Was he makin any noises or anything like this, any movement?

A. (inaudible)

Q. Okay and from that you left his room and went where?

A. Proceeded down to Mrs. Perry's room.

Q. What happened there?

A. After I went in she turned over in bed and she said ah

Q. Inaudible

A. Is it done.

Q. She said is it done?

A. That's right.

Q. What did you say?

A. I said yes it is.

Q. What other conversation took place?

A. Okay it was some conversation about some money then, I asked her about, and she got up and proceeded to the closet. Went into the closet, into a purse, grabbed some money out, shoved it in my hand, and I turned around and me and Michael proceeded back out of the house by the same way we came in.

Q. What was her attitude at that time, can you tell us?

A. Um, very nice.

Q. Okay, anything else said to her or by her to you?

-28-

A. No.

Q. She did recognize you is that correct?

A. Yes she did.

Q. She knew why you were there?

A. Yes she did.

Q. Where is Michael now?

A. He was on the steps.

Q. Did he say anything to you during this time?

A. Um, no not initially no.

Q. When you left Mr. Perry's room was he alive or dead?

A. I couldn't be sure, I didn't inspect the body.

Q. When you left that house, ah you, do you feel in your own mind that he, he was dead?

A. Yes I felt reasonably sure.

Q. How much money did she end up giving you at that time? Did you count it later?

A. Yes I did.

Q. How much was it?

A. About seven bucks.

Q. Okay. Now after you had received the money from Mrs. Perry what, what did you do?

A. Um we left the house back out through the garage, picking up the C. B. and the tape on the way out, proceeded to the car, got in the car, started up, drove off reasonably, came down Curtis and ah came back to 6 Mile then came back to Detroit down 6 Mile.

Q. Okay when you picked up the C. B. was it in ah any kind of container or did you just pick it up?

A. Ah brown paper bag if I'm not mistaken one that we'd found in the garage.

Q. Okay and with the C. B. was also what?

A. Ah the tape recorder.

Q. So the other items that you took from the house were could you tell us?

A. Ah it was the black leather ah bag.

Q. Anything else?

A. No.

Q. A watch, ring, jewelry, anything like that?

A. Oh ya, okay, ya a watch.

Q. There was a watch that you had also taken.

Q. What was in the black plastic bag?

A. Um, major credit cards, ah, identification, a check book and there was ah (9) 100 dollar bills.

Q. What did you do with the money?

A. I split it with Michael.

Q. Exactly in half?

A. That's right.

Q. You got $450 and so did he?

A. That's right.

Q. When you went back to Detroit you used what route?

A. Ah 6 Mile.

Q. Got back to Detroit about what time?

A. Ah, um it was a little bit before daybreak.

Q. What time would you estimate that you actually shot Mr. Perry?

A. Um I would say it was between 3 and 4:00.

Q. Okay and you were in that house totally how long?

A. Maybe about 45 minutes, an hour at the longest, that's you know the time in the garage you know getting through the door and all of that and upstairs part too.

Q. Okay now can you tell us prior to you being arrested how many people knew that you were

involved in this murder?

A. No one but just the many people that knew before that.

Q. And could you name these people?

A. Yes I can, okay its Charles Knight, ah Miss Millie Perry, ah well I, I couldn't say Sylvia you know because she didn't, she didn't know, you know, who um or what you know plus she was out of town then, she didn't know.

Q. And of course Michael White.

A. Ya, right.

Q. Okay so just the four of youse.

Sgt. Hoff. Alright Robert is there anything else that you'd like to add to this statement? While we're talking here?

A. No that's the whole (inaudible).

Q. Your involvement really consisted of perhaps only this July 11 and the 12th is that correct?

A. That's right.

Q. Did Millie ever indicate to you at that time of the murder as to what she was gonna do as far as calling and reporting this to the police?

A. No she didn't.

Q. You left that up to her?

A. inaudible

Q. And you assume that she would report that there was a breaking and entering and some intruders came in and shot her husband?

A. That's right.

Q. Did you have some conversation with Mrs. Perry after this murder?

A. No I didn't.

Q. You had never contacted her?

A. No I didn't.

-31-

Q. Okay now you've been in the custody of the Livonia Police Department for approximately 2 days, would you say that's about right?

A. inaudible

Q. Now during that 2 days have you been mistreated by anyone?

A. No I haven't.

Q. Has anybody guaranteed or promised you anything specifically for you cooperating in making this statement?

A. No nothing has been actually guaranteed but it has been said that um that, that something may be, may be able to be worked out afterwards with my truthful testimony about my part in this killing.

Q. Okay is there anything else now that ah you wanta add to this statement ah?

A. No.

Q. Okay, Sgt. Garrison is there any other questions that you mi ht have at this time?

Sgt. Garrison: None at all Sgt. Hoff.

Q. Sgt. Ericson do you have any questions that you might have?

Sgt. Ericson: No.

Sgt. Hoff. Alright, Pat that will conclude this statement, the time now is 11:12 a.m., August 2, 1979. Thank you.

Sgt. Hoff: Before we conclude this interview I want again to have Robert Jackson look at these photographs and tell us what they are, turn them over and read the number and then I want him to initial them. You can start with this one.

Robert Jackson: This is Charles Knight, #4A, Michael White #5A, their home on Country Club #2A, (just here,

Sgt. Hoff: Ya somewhere on the bottom anywhere.

Robert Jackson: Mr. and Mrs. Perry, #1A,

Sgt. Hoff: Okay that concludes the interview and the identification of the photographs, the time now is 11:13 a.m.

RESPONDENT'S ENTRIES

SGT. R. ERICSON (19 NOVEMBER 1979):

-168-

Q. Why did -- it is true, isn't it, that you were able to get Mildred Perry's first warrant in approximately two hours and ten minutes, weren't you; didn't you fill out an initial warrant request on Mildred Perry before you did anything else?

A. Yes, sir.

Q. And you were able to get that in approximately two hours and ten minutes?

A. You mean get the warrant authorized by the prosecutor?

Q. Get it filled out and then take it to Mr. Sage's office and have it authorized to bring it back before Judge McCann?

A. No, sir.

Q. Well, how long did that one take?

A. I would say a total of about five, six hours work.

Q. And that was done on which day?

A. I started that on Sunday, sir, Sunday night after Mildred's arrest, on Saturday night, excuse me.

Q. That would be July 28th?

A. Right.

Q. But there was no additional work as far as Mildred Perry was concerned that you had to do on the morning of August 1st, was there; you had already typed out all that

-169-

information, hadn't you?

A. Yes.

Q. In fact, the warrant requests are almost identical except for the last part about Mr. Jackson and Mr. White, isn't that correct?

A. They are similar in the beginnings.

Q. Well, it is true, isn't it, that one of the reasons why -- you knew that some of the other officers were talking to Mr. White, didn't you?

A. There was nobody else talking to Mr. White at that point.

Q. You know of no other conversations between any of the officers other than what you have just testified to, correct?

A. That is correct.

Q. When you picked up Michael and Robert Jackson and you had told them something or another, don't say anything until we get back to the station or no talking or something to that effect

after you had given them their rights, is that correct?

A. I said I suggested that you not make any comments until we get back to the office.

Q. And, other than what you have testified to earlier, you didn't hear anything else that they said?

A. Nothing that I made note of.

Q. So if they ask you about getting a lawyer, you may not have heard it?

A. If they would have asked me a specific question, then I would have remembered it, sir.

Q. Sergeant Ericson, I want you to compare your warrant request made up for Mildred Perry the first time and your warrant request made up the second time and tell me where it is significantly different in terms of the information it was necessary to gather; you do have both copies, don't you?

A. Yeah, they should both be there.

Q. Why don't you take a moment and tell me where they are?

A. (Witness complied)

THE COURT: Let's proceed, shall we? You are taking an awfully long time. Come back, Sergeant Ericson, and

let's proceed with whatever questions you have.

BY MR. DURANT:

Q. What happened in terms of -- before I ask you specific questions about these two, what happened -- you took the first one out to Mr. Sage's office and received a warrant, correct?

A. Yes.

Q. So between the first one and the second one -- by the way, did you also receive a warrant for Chare Knight for the first one, the John Doe?

A. No, sir.

Q. He would only write it for Mildred Perry?

A. That is correct.

Q. So on the second one the only additional information that you had to add was the fact of receiving Mr. Knight's admission, correct?

A. That was one of the things, his arrest.

Q. Number two was the fact that Bobby Jackson had given you a statement implicating Chare, correct?

A. Yes, sir.

Q. Number three, the fact that at the polygraph -- at a polygraph examination or after a polygraph examination that Mr. Jackson had then said or implicated Michael White?

A. Yes, sir.

Q. Now except for the polygraph information, you had all that information on July 31st, did you not?

A. No.

Q. Of those things that I just listed, what didn't you have by the end of the day on July 31st?

A. At the end of the day on July 31st, we did not know for sure who to believe, whether to believe Charlie Knight's version of what happened or Bobby Jackson's version.

Q. Knight's, which implicated Michael White, correct, in the stories that you had been told, correct?

A. No, sir.

Q. You mean in the stories that you have been told someone had implicated specifically Michael White? Did you understand the question?

A. Yes, sir.

Q. And what is the answer?

A. Yes, sir.

Q. Somebody specifically implicated Michael White in the stories that were given to you?

A. Yes, sir.

Q. Who?

A. Charlie Knight.

Q. When? Are you talking about the booking incident?

A. Right.

Q. Would you have gone to get a warrant just on that without even checking?

A. I would present it.

Q. Did you present it?

A. Not on the basis of that alone, no.

Q. You never presented that, did you, for the warrant request?

A. I will be honest with you. I don't remember if it is in the warrant request or not.

THE COURT: What is your question? Let's proceed.

MR. DURANT: I have given him the warrant request. He said he didn't remember whether or not he included the incident in the booking area in which Chare Knight supposedly said that -- mentioned Michael White's name as being at the scene or words to that effect.

-173-

MR. SELLER: Your Honor, the warrant request is People's Exhibit Number Two. I am sure that we can agree at some later time --

THE COURT: (Interposing) Let's move on. The warrant request is in evidence as Exhibit Two.

BY MR. DURANT:

Q. But, Sergeant Ericson, you didn't consider that a significant enough detail to put in that, did you?

A. Not at the point that I submitted it, no.

Q. After you had taken the statement from Mr. Jackson or engaged in conversation with him in which he indicated in his statement that he and Chare Knight had been there, you had enough information then to get a warrant, did you not, present it for a warrant?

A. Against who?

Q. Against Mr. Jackson.

A. Yeah.

MR. DURANT: Your Honor, I don't think I have any more questions. Let me just check my notes.

THE COURT: Are you finished, Mr. Durant?

MR. DURANT: One other question.

BY MR. DURANT:

Q. Sergeant Ericson, after that meeting at three-thirty with Mr. Jackson, you had enough at that time, as you say, to present information to Mr. Sage for the warrant write-up,

correct?

A. Against who, sir?

Q. Against Mr. Jackson.

A. Yes, sir.

MR. DURANT: No other questions, Your Honor.

ROBERT JACKSON (26 NOVEMBER 1979):

-442-

Q. Did they tell you about your right to have an attorney appointed for you if you didn't have any money and your right to have an attorney present at the time of questioning?

A. This is in route to the Livonia police station?

Q. Yes.

A. No, there wasn't.

Q. Did they tell you that anything you say can and will be used against you in a court of law?

A. No, they didn't.

Q. Sir, when you got to the Livonia police station and you got in the conference room, who was inside there at that point?

A. Sergeant Ericson and Sergeant Garrison.

Q. And was Mr. White in there?

A. No, he wasn't.

Q. You had been separated?

A. Yes, we had.

Q. Were you asked any questions while you were in that room?

A. Yes, I was.

Q. Did you answer the questions right away?

A. Um no, no, I didn't.

Q. Okay. What questions were you asked, what were some of the questions you were asked?

A. Such as did I know why I was there; I had been implicated in a murder that had happened out in Livonia, and I was

supposed to have been the one that did the shooting. You know, questions revolving around there.

Q. Who was telling you this?

A. Both Sergeant Ericson and Sergeant Garrison.

Q. Both of them were talking at one point, is that right?

A. That is right.

Q. Or from time to time. Now, sir, were you given your Rights then or read your Rights?

A. Not then, no.

Q. Okay. Did there come a time when you were read your Rights?

A. Yes, I were.

Q. About how much later?

A. That was upon the first initial tape recording that I gave.

Q. The first tape recording you gave?

A. Yes, I was.

Q. The one that was not audible?

A. That is right.

Q. Okay. What did Sergeant Garrison and Sergeant Ericson tell you about what would happen to you, if anything?

A. They told me that -- such as why did I think that they searched so hard to find me, and that upon finding me, that they had enough evidence then to take me to court on Murder One, which would get me life, and that they would

offer me something if I was to take it, sort of saying, you know, in effect that they wanted Mrs. Perry, okay.

-444-

Q. Did they tell you that they wanted Mrs. Perry?

A. Yes, they did.

Q. And they wanted Mrs. Perry for what?

A. Because they felt that she was the perpetrator of having her husband killed or something.

Q. You were saying something about what could happen to you?

A. Yes. They said that they could take me to court right then on Murder One. It wasn't a matter of whether I was guilty or not, it was a matter of where the evidence was pointed to.

Q. Okay. Had they told you anything about someone else's statement?

A. Yes, they did.

Q. Whose?

A. Mr. Knight.

Q. Anyone else's statement?

A. No.

Q. Okay. Now did you tell them at that time -- did you give any statement at that time?

A. Not after -- at the initial -- when I first got to the precinct, when we first talked, no, I didn't give a statement then. This is when the subject came up about -- when I asked them for an attorney, that was the first thing I said.

Q. You asked for a court appointed attorney?

A. Yes, I did.

Q. What did you say?

-445-

A. I said I wanted an attorney.

Q. Did anybody say anything?

A. Yes.

Q. Who?

A. Sergeant Ericson and Sergeant Garrison said an attorney could do no good at this particular time, and if I further pursued in obtaining an attorney, that I would be charged with Murder One anyway, and they would offer me the best deal possible at that particular time.

Q. Did they say what that deal was?

A. Yes, they did.

Q. What was that?

A. Second degree Murder for collaborating with the way Mr. Knight was telling it.

Q. They said they would offer you Second Degree Murder if you went along with what Mr. Knight was saying in his story?

A. That is right, with the consideration of something lesser.

Q. With the consideration of something lesser?

A. That is right.

Q. Who told you this?

A. Sergeant Ericson and Sergeant Garrison.

Q. Did they both tell you this?

A. Yes, they did.

Q. At the same time, different times?

A. No, at different intervals. They kept questioning me and

badgering me and questioning me and --

Q. (Interposing) You say "badgering" you; what do you mean?

A. Well with words so-to-speak.

Q. Well, did they at any time strike you?

A. No.

Q. Was anyone struck as far as you were able to determine in your presence?

A. No, not in my presence, no.

Q. Did you hear anything that caused you to feel any particular way about being struck?

A. Not at that moment. I did later on, upstairs in the holding pen.

Q. Was this before or after you gave any statement?

A. Before.

Q. What did you hear up there?

A. I heard something in the backroom, someone kept hollering and screaming back there, hollering and screaming, you know, for one of the guards to come back there, and when he did come back, a couple more of them came back with him and they went to working him over.

Q. Did you see this?

A. No, I didn't see it.

Q. What do you mean "working him over?"

A. Well, physical harm, beating up on him.

Q. Is that what you thought they were doing?

A. Yes, I did.

Q. And that is what you felt based upon what you heard?

A. That was the impression I got.

Q. Did that make any impression on you; did that cause you to feel any particular way?

A. Yes, I did.

Q. Why?

A. It caused me to fear for my own life.

Q. Okay. Now you have indicatd that they did ask you questions when you got into the conference room?

A. That is right.

Q. And at some time later you were taken and put into a holding cell; is that what you call it?

A. That is right, the bull pen.

Q. That is where you heard this commotion down the hall, is that right?

A. That is right.

Q. Had you given a statement up to that time?

A. No, I hadn't.

Q. Had you told them whether or not you would give a statement or -- what had you said in response to their questions?

A. I was still asking for an attorney, and I never received one.

Q. Okay. Did anyone ask you at any time about any background information on what you did, where you went to school, where you lived; any of them ask for that information?

A. Yes, they did.

Q. Who?

A. The two sergeants in question.

Q. Not in question; which two, Sergeants Garrison and Ericson?

A. That is right.

Q. Did you give that information?

A. Yes, I did.

Q. Did you at any time say whether or not you were employed?

A. No, not that I can recall.

Q. Okay. Did you give that information -- had you given that information about whether or not you were employed to the Detroit Police Department?

A. Yes, I believe so.

Q. Okay. Incidentally, while you were at the Detroit Police Department, were you questioned there?

A. Yes, I was.

Q. How many times?

A. Maybe about three or four times.

Q. Three or four times?

A. Yes.

Q. All right. When did you first get to the Detroit Police Department, if you know? When were you arrested?

A. It was July 30th I believe.

Q. Okay. Now after you got to the conference room at Livonia, and you have already stated you later went to a holding cell,

did you leave that holding cell? Were you asked to come back out again?

A. Yes, I was.

Q. Who did this?

A. I forget which exact officer but it was between the two.

Q. Between the two; that is Sergeants Ericson and Garrison?

A. Yes.

Q. Had you seen Sergeant Hoff yet?

A. No, I hadn't.

Q. And where did you go after you left the holding cell?

A. I went back down to the conference room again, this time upon which I did make a tape recording.

THE COURT: Is that the first tape recording that didn't come out?

THE WITNESS: Yes, it is.

BY MR. WILLIS:

Q. Did something cause you to make that tape recording?

A. Yes, it was.

Q. What was it?

A. It was the promises that were made towards me, and it was out of those particular threats and promises that I did make those statements.

Q. What promises and what threats?

A. For the leniency of the Second Degree with something lesser and that it was only foolish of me to keep from making an

incriminating statement that they

wanted against Mrs. Perry because I would do life anyway so I was really doing myself a favor by going along with it.

Q. Did they say anything to you about any probation officer?

A. Yes, there was.

Q. What did they say about that?

A. They said a probation officer would come and look into the case and that I could expect something then too.

Q. Okay. Anything else about a probation officer?

A. No, not at that point.

Q. Now at the time you gave the first tape, were you doing this totally based upon what you had to say?

A. No.

Q. What was it in part based upon?

A. Upon what they were telling me what had happened and how they wanted the tape to go about.

Q. Well, was there any such indication while you were being recorded, while the tape recorder was going on?

A. I don't --

Q. (Interposing) Were they saying anything or doing anything while you were actually answering questions?

A. At certain different times, when certain questions would come up where a yes or no was relevant, a wave of the hand or something.

Q. Like what? Can you think of something?

A. Such as shake your head no or nod yes.

Q. Sir, do you recall being asked questions and having those questions and answers taped at or about five fifty-two p.m. on July 31st, 1979?

A. Yes, sir, I do.

Q. Let me show you page one of that, in this area right here. Do you want to take a look at that?

THE COURT. What area are you pointing to?

MR. WILLIS: Near the bottom line.

BY MR. WILLIS:

Q. Have you had a chance to look at that?

A. Yes. I am looking at it now.

Q. Up to that or as of the end of that answer, okay, from the beginning of the tape to the end of that answer had there been any indications by anyone as to what you should say?

A. This was at the end of the first tape?

Q. No. This is from the beginning of the first tape up through all that is covered by this first page, okay?

A. Okay.

Q. Had there been any indication as to what you should say from anyone who was there in the room while you were giving that taped statement?

A. Yes, sure.

Q. How was this done?

A. It was said in different intervals, such as Mr. Knight says it was this way, you were the one that went into the house that done the killing --

Q. (Interposing) Let me interrupt you. I mean while the tape was going on -- you have already indicated something with your hands, is that right?

A. That is right.

Q. Was anything like that done up to this point as to how you should answer?

A. Yes.

Q. What would they indicate with their hands?

A. Such as -- I am trying to think of a particular part of the statement.

Q. Do you want to look at the statement?

A. Yes, let me take a look at that.

Q. What would they indicate?

A. They would indicate that those were just -- those questions were just preliminaries really.

Q. No, I understand that, but were any motions or signs made while you were being -- while you were giving that taped interview?

A. That particular one there, no, not on the first page.

Q. Not on the first page?

A. No.

Q. Let me ask you this then. With respect to the Rights, were

you told what your Rights were during these interviews?

A. Yes, I was told.

Q. Okay. Was there ay mention during those statements that you had the right to an attorney?

A. Yes, it was mentioned.

Q. Okay. Now you have already testified that you asked for an attorney prior to that, is that right, on several occasions?

A. That is right.

Q. Now did you say anything then at the time they asked for or they told you you had the right to an attorney during the tape? While you were being taped, did you say anything about yes, I want an attorney?

A. No, because it had already been explained away so-to-speak that I was, you know, that I would do life anyway if I didn't go along with the collaberating story with Mr. Knight about what had happened, and that if I refused to make the statement, they had enough evidence pointing towards me that would say that I was the one that did the killing, and that it didn't make any difference whether it was a lie or whether it was the truth, but this is the way that the evidence was pointing.

SGT. S. GARRISON (20 NOVEMBER 1979):

Q. You see what I'm doing now?

A. I know what you are trying to say, but no.

Q. You see what I'm doing, using my hand to wave; do you see what I mean?

A. That is correct, sir, I see you waving your hand in front of me.

Q. You didn't do that?

A. No, sir.

Q. Did you see anyone else doing that?

A. No, sir.

Q. Sir, then let me ask you this. Had there been any statement by Mr. Jackson as far as you know or was there any to the effect that he wanted a lawyer?

A. No, sir.

Q. You never heard him say any such thing?

A. No, sir.

Q. Did he ever say that he wanted a break, anything to keep him out of jail?

A. No, sir.

Q. He never said that in your presence?

A. No, sir.

Q. Did he say at any time that he wanted to be given some kind of a break, whatever it might be, keeping him out of jail or giving him some reduced sentence?

A. A discussion was -- did come up with reference that he did

not want to go to jail, that is true.

Q. Oh? When did that discussion come up?

A. During one of the interviews.

Q. During one of the interviews?

A. Yes.

Q. A discussion? Was anyone writing that down?

A. Sergeant Ericson was taking notes. He may have wrote it down.

Q. I see. And who was present at that time?

A. It would be Sergeant Hoff, myself, Sergeant Ericson.

Q. And that was at a time when Sergeant Ericson was taking notes?

A. That is correct, sir.

Q. Were you taking notes?

A. No, I wasn't.

Q. Was Sergeant Hoff taking notes?

A. No he wasn't, I believe. He may have been taking notes. I can't remember.

Q. What day was that?

A. We would be talking about -- on the first day of the arrest. We are talking about the 31st.

Q. The 31st of July, right? Okay. Was that -- about how much time after he was arrested did this take place when he was asking --

A. (Interposing) Probably maybe an hour -- after the arrests? I would say the arrests occurred approximately two o'clock,

we started talking to them maybe three-fifteen to three-thirty, we talked to them only a short length of time, I would say an hour after that, so I would say a quarter to up to maybe four-thirty, five o'clock.

Q. Now when he was asking about this, did anybody respond?

A. Either Sergeant Ericson or myself responded. Maybe we both did.

Q. And what was he told about that?

A. He was going to go to jail.

Q. That he was going to go to jail?

A. That is right.

Q. Did he say I want a break or something, is there any kind of way I can avoid jail?

A. No, there is not.

Q. My question is did he say that?

A. Yes, sir.

Q. He did. And what was the response to that?

A. He has to go to jail, Murder in the First Degree, it is not up to us. A warrant would be issued, will be issued or is going to be issued for Murder in the First Degree and perhaps Conspiracy to Murder.

Q. Okay. So you told him he had to go to jail, it was Murder in the First Degree?

A. That is what the charge would be. It is life mandatory.

Q. Did you tell him that?

A. He asked what type of a charge it would be.

Q. You told him it was mandatory life?

A. Yes, sir.

Q. Did you tell him there was any difference between First and Second Degree?

A. Yes. What else would be the next one down and we said Second Degree and there again, give him what the penalty was for the Second Degree was.

Q. Did he ask if he could be given a break so that he could be charged with or could plead guilty to Second Degree Murder?

A. We told him again that we were in no position, no.

Q. No, no. My question is did he ask that?

A. What was the question again?

Q. Did he ask if he could be given a break to the effect that he could plead guilty to Second Degree Murder?

A. I would say that he wanted to plead to anything if he could get a break too, and our response again, counselor --

Q. (Interposing) I can appreciate what he wanted to do.

A. Yes.

Q. But did he ask if he could plead guilty to anything then?

A. Yes.

Q. Less than First Degree?

A. Yes.

Q. And your response then was what?

A. We cannot do nothing about it. We are going to obtain a warrant for him the following day and the prosecutor most likely will issue a warrant for that particular case. Later on you may obtain an attorney and whatever the attorney and the prosecutor works out between each other, then it is not in our hands, we can do nothing more than the First Degree.

Q. Did you say to him that if you cooperate with us, we will do the best we can to see to it that you could plead guilty to Second Degree?

A. No. That was an -- it was given as such?

Q. Right, but it was indicated, is that right?

A. No, I wouldn't say that either.

Q. But you say it wasn't outright?

A. No, I don't want to say that. That is not what I am trying to say.

Q. Okay. Then in any event the -- my client, Mr. Jackson, did indicate some time later that he felt he was being offered -- going to be offered Second Degree, is that right?

A. No, sir. He may have felt it himself. I can't tell you if he did or not. I don't know.

Q. My question is -- I am not so concerned about his state of mind as I am about what he said.

A. No.

Q. He did say something that indicated he felt that way, right?

A. No.

Q. Well, when you had that tape on a certain date, namely I believe it was -- well, I will move on and let counsel find it.

During one of the tapes that he gave, he indicated, did he not, at the end of the tape on August 2nd, 1979, that he was -- wasn't actually guaranteed anything but that something -- but it has been said that something may be able to be worked out afterwards with his truthful testimony about his part in the killing; he did say that, right?

A. I will have to look at the transcript.

THE COURT: Here is what the language is. Do you want it?

MR. WILLIS: I just want to ask him if he recalls it?

THE COURT: Do you recall it?

THE WITNESS: I recall hearing in the courtroom something similar to that.

BY MR. WILLIS:

Q. Do you recall that during the tape?

A. Not word by word; no, sir.

Q. Well, do you recall something to that effect?

A. Read the question to me again, would you please?

Q. Well, do you recall him saying words to the effect that he -- well, that there had been no specific guarantee as to what he

was going to get but that there was mention that he may be given a break?

A. I don't remember seeing that.

Q. Nor hearing that?

A. Hearing that, no, sir.

Q. Well, then I would show you -- well, I will show you my copy. You may read any part. This is a purported copy.

THE COURT: It is page thirty-one of Exhibit Seven.

BY MR. WILLIS:

Q. You can read any part you want. I direct your attention to the words outlined in red.

A. I see it, sir.

Q. Do you recall him saying that?

A. Yes, sir.

Q. You do?

A. Yes.

Q. Now after hearing that, you were asked if you had any other questions at that time, is that right?

A. That was asked.

Q. And you said none at all. You threw the ball in effect to Sergeant Hoff, right?

A. I don't think I said Sergeant Hoff. I think they just asked me and I think my reply was probably not at all.

Q. All right. I am just reading something out of there. But

in any event, you didn't have any, right, you didn't have any questions anymore?

A. No, I had no questions.

Q. But did that strike you as being odd then since you had already had the conversations with him?

A. No, because I can imagine a person who is arrested -- what is going in his mind. That is just the way I took it.

Q. Well, but, sir, you had been the person who had been present through all three of the tapes, three of them that you knew of?

A. Yes, sir.

Q. Had you been present when any oral -- you had been present also when an oral statement was taken from him, is that right?

A. That is correct, sir.

Q. Or at least someone was writing something?

A. Yes, sir.

Q. At that time my client had indicated already to you, had he not, that he wanted some kind of a break, he wanted to stay out of jail?

A. That is correct, sir.

Q. And as you indicated, you had nothing to do about that as a police officer?

A. By keeping him out of jail?

Q. Right.

* * *

A. With Mr. White and Mr. Jackson?

Q. No. Notes that you took during times that you were present either questioning or when those two individuals were questioned.

A. No, sir.

Q. Okay. As far as Mr. Jackson is concerned, you said it wasn't given as such, in terms of if you are cooperative, we will do the best we can -- was it words to that effect? I understand no guarantees were made but were they words to that effect?

A. No, nothing was ever said about the cooperation. Right from the start we are unable to do anything.

Q. Well, when you were asked that question, rather than saying no, you said not given as such. What did you mean by that?

A. Read the question over again.

Q. Well, you were asked, as I remember, on direct examination, did you say anything to Robert Jackson that if you cooperate, we will do the best we can for you, and rather than saying no to that, you said nothing was given as such or that was not given as such. Now that is not an outright no. You seemed to be suggesting a qualification. What did you mean by not given as such?

A. I thought I explained it after that with reference to the fact that he wanted to know what life imprisonment carried. We gave him the penalty.

* * *

I asked him that we wanted to get the gun back, that it scares me knowing that there is a gun on the street that may be just laying around someplace where a child could pick it up and shoot some other children or person.

Q. Did he give some indication by words or whatever that he could help you in locating that gun?

A. He told me that he has no knowledge of any gun.

Q. After you had given the narrative of the story, isn't it true that you went to get Bobby Jackson?

A. Yes, sir.

Q. Now was it before or after that some question came up about a lawyer?

A. The question came up before that, sir.

Q. Mr. Jackson came in what, about three-quarters of the way through the interview or about half way through?

A. I would say about half way.

Q. And it was shortly before that that this area that we are going to go into about the lawyer came up, is that correct?

A. There was a question that came up about a lawyer.

Q. About shortly before you went to get Bobby Jackson?

A. Yes, sir.

Q. And isn't it true that you said in response to something that Mr. White said that, you know, if you want a lawyer, a lawyer will tell you not to talk to us or words to that effect?

A. That is correct, sir.

Q. What was said after that by you?

A. I informed him that all we are asking him to do is tell us the truth, that some time in your earlier childhood your teacher told you to tell the truth, your mother told you to tell the truth, you must have had some religious background, either a priest or a reverand, and he told you to tell the truth, and that is all we are asking you to do now is tell us the truth.

Q. And that was after the remark, you know, that it doesn't make -- excuse me just a second -- that you told him that in effect immediately after, saying to him that a lawyer, and the fact that you want a lawyer, a lawyer is only going to tell you not to talk to us and you tell us the truth, and then you went into the sequence you just gave us?

A. I also told him I'm asking you to talk to us. An attorney is going to tell you not to talk to us. Only you can make that decision.

Q. And he had brought up about well, what would an attorney say or words to that effect, I wasn't there, but words to that effect?

A. True; yes, sir.

Q. I'm just trying to get the sequence, and that is when you made the remarks you did about what a lawyer would tell him, and then being brought up to tell the truth, and that is

-281-

was we want, correct?

A. That is correct, sir.

Q. Wasn't something to that effect also said, I think it was to Robert the day before or not, I am not sure about the time, about telling the truth and that sort of thing?

A. I may have told Mr. Jackson the same thing about telling the truth.

Q. In response to, you know, the same kind of inquiry or whatever, that, I mean, the same kind of inquiry concerning a lawyer, and then the sequence of you were brought up to tell the truth by your mother, by your teacher, and that sort of thing?

A. There was nothing in the admission of Mr. Jackson about an attorney or question about an attorney.

Q. That was only with Mr. White?

A. That is correct, sir.

Q. You got those keys from Michael and then took them to his wife?

A. I can't remember that much about it, sir. It is just a small detail that I just can't remember.

Q. Do you know how old -- do you know how old Michael White is?

A. Approximately I would say twenty-three, maybe a little bit older.

Q. By the way, were you present when the gun was found, not

* * *

-285-

most.

Q. Wasn't there some period during there, even for a couple of minutes, that they were left alone in terms of earshot?

A. Mr. Jackson asked us to leave, that he would like to talk to Mr. White. At that time Sergeant Hoff and myself did remove ourselves into Sergeant Hoff's inner office.

Q. Who took Mr. Jackson back?

A. I can't say, sir.

Q. But you got him, right?

A. Oh, Mr. Jackson?

Q. Yes.

A. Excuse me, I took Mr. Jackson back upstairs.

Q. Did you see Lieutenant Campbell come in the room at that time?

A. Lieutenant Campbell was downstairs. I saw him go in. That is all I can tell you, sir.

Q. Did he say something that he wanted to try and locate the gun or get Mr. White to have him tell where the gun was?

A. Yes, sir.

Q. He said that to you?

A. He said that, I believe, to myself and Sergeant Hoff both.

Q. Now I want to get into a little bit more sensitive area. I don't want to hold you to the exact words. In fact, I want you to tell me the words, if you can, any kind of remarks made to Mr. White, something to the effect that if

he cooperated or if he tells us the truth, we will at least while you are not in a position, we have heard all of that, to make guarantees, but you will at least talk to the prosecutors in charge of the case and let them know that you have cooperated?

A. No, sir.

Q. Are you saying there was absolutely nothing whatsoever like that conveyed in your presence or by you to Mr. White?

A. Let me get it straight in my mind. The question here is what did we say? Exactly as I have stated before; that we cannot do anything, it is up to the prosecutor, and later on, in front of

Mr. Jackson, not Mr. Jackson, but Mr. White, we may have stated that at a later date you will have an attorney and the attorney will talk to the prosecutor but we can't do nothing more for you.

Q. You never indicated specifically or otherwise that, you know, if you testify truthfully or whatever, that you might be able to plead to Second Degree or something less than First Degree?

A. We would have no power to do it.

Q. But to recommend it?

A. No, sir.

Q. At the time that you were talking to Michael White, which was only a few hours before you were to -- everyone was to be arraigned -- are you saying that the status of the case --

strike that. Isn't it true that the status of the case at that time was such that if you could locate the gun and get a statement from Mr. White to corroborate with Mr. Jackson's statement, that you would have wrapped up the case except for the formal court proceedings?

A. Was that stated?

Q. Yes.

A. Yes, sir.

Q. Okay. In what context was that stated?

A. Sergeant Hoff made that statement.

Q. What did he say?

A. Basically the same thing.

Q. As best as you can remember.

A. You get the gun, we have got the people arrested, we get the gun, that ties up the entire case.

Q. I am sure you explained that the prosecutor makes a decision, the judge makes a ruling, there is a court Hearing, but that the polilce officers are not helpless; did you not indicate at some point that wherever you could, that you would speak to the prosecutor or help if he told the truth, like his mother told him, like the police told him?

A. Okay. The only thing I can remember is that we would talk to the prosecutor and inform him as of this but we cannot do nothing for your case, it is First Degree, we can't do nothing about it. It is the prosecutor's case, it is not

our case.

Q. But didn't you also say that if Michael told the truth, as he had been asked to tell the truth, that the prosecutor would, you know, it is not unusual that the prosecutor would act

favorably on that, I mean, take that into account?

A. Counselor, I don't know what the prosecutor would do one way or the other.

Q. I know you don't know what Mr. Seller would do, but in terms of communicating to Mr. White, I mean any -- you have explained to Mr. White look, tell us the truth, you have got a certain background, you know, all I'm asking you to do is tell me the truth. Now there must have been something said to him that we will communicate that to the prosecutor, we can't make guarantees, but that we will help you where we can?

MR. SELLER: Objection. I think that has been asked and answered.

THE COURT: I think it has been asked and answered about three times. I will sustain the objection.

BY MR. DURANT:

Q. Did you told to Mr. White just prior to his taping?

A. Well, I was present. I don't know if I talked to him or not.

Q. You had no substantive conversation?

A. No, sir.

SGT. W. HOFF (21 NOVEMBER 1979):

-353-

Q. In other words, within an hour of the ending of the tape on August 2nd, 1979, the tape of my client, you had no such discussion with Sergeant Ericson or Sergeant Garrison about anything offered to my client?

A. That is correct.

Q. Or any statements about less than First Degree Murder, is that right?

A. That is correct.

Q. When my client was first arrested and you became aware of that as the officer in charge, did you say to any of the other officers that we should arraign this person as soon as possible?

A. No, I didn't say that.

Q. You had in your possession at that time, or were aware of, the statement of Mr. Knight that my client was the shooter, right?

A. That is correct.

Q. And you had sufficient information at that point to get a warrant, didn't you, as far as you were concerned?

THE COURT: What day are you talking about?

MR. WILLIS: July 31st, the day my client was arrested.

THE WITNESS: I don't know that we did

-354-

at that point. We may have, yes. I am not sure.

BY MR. WILLIS:

Q. Well, I can appreciate that, but as far as you were concerned you had enough information, didn't you?

A. We certainly had enough reason to arrest him for the charge; yes, sir.

Q. But you had enough information as far as you were concerned to seek a warrant, didn't you?

A. We could have sought a warrant that evening. However, I think the Prosecutor's Office was closed.

Q. I see. There is a person on duty, isn't there, to sign warrants in the evenings, isn't there?

A. No, sir, there is not.

Q. No such person?

A. No, sir.

Q. Okay. You were aware that the Prosecutor's Office opened up in the morning, though, right?

A. Yes, sir.

Q. And you did feel, by the morning, that you had enough information to get a warrant on Robert Jackson, didn't you?

A. Yes, sir.

THE COURT: When was the warrant obtained?

THE WITNESS: On August 2nd at approximately one o'clock, Your Honor.

MR. DURANT: August 1st.

-355-

THE WITNESS: Correction, August 1st.

BY MR. WILLIS:

Q. That is at least the testimony?

A. That is correct.

Q. Not one o'clock, though?

A. Well, it was Sergeant Ericson --

THE COURT: Let's just check the file out to tell. I guess it won't tell the time but the date.

MR. SELLER: I can tell you what the testimony was. Sergeant Ericson said we went out at one and was through at around three-thirty and returned by four or four-thirty. Arrived at the Prosecutor's at one, was there a few hours.

MR. WILLIS: All right.

MR. SELLER: And then came back by four or four-thirty.

BY MR. WILLIS:

Q. Anyway, it was August 1st, is that right, sir?

A. Yes, sir.

Q. Now Mr. Jackson, as far as you were concerned, if the warrant was issued in the morning of August 1st, 1979, could have been arraigned that morning, is that right?

A. Had the warrant been issued, yes, sir.

Q. Except, of course, though, you did need him to take him to

-356-

the polygraph operator, is that right?

A. Yes, sir.

Q. So then, recognizing the modus operandi, if you will, of the polygraph operator, your reason for taking Mr. Jackson to the polygraph operator was to see if he was telling the truth and to get a statement, is that right?

A. To see if he was telling the truth. We already had a statement from him.

Q. Right, but you recognized that the polygraph operator had a certain way or certain modus operandi, namely he got statements; is that what you said earlier?

A. No, I didn't say that earlier.

Q. You didn't ay that earlier?

A. No.

Q. Let me get back to the original question. You answered a good part of it. I want to get the other part. Yes, you did have a statement obviously, right, and you did want to see if he was telling the truth, but you also wanted another statement from my client to be given to the polygraph operator, is that right?

A. No, that is not entirely correct. Our purpose was to determine whether or not he was truthful in his original statement.

Q. No, no, I understand what you are saying, not entirely correct, and I do understand that, sir, but see, my question isn't that that was all you wanted when I talk about the

-357-

statement to be obtained by the polygraph operator. In addition to the things you have stated, you wanted to find out whether or not he was telling the truth; you also, in addition to that, wanted another statement from him to be obtained by the polygraph operator, didn't you?

A. If the original statement was not correct, yes, to resolve the issue, whether or not Chare Knight was in fact with him.

Q. Now did you at any time tell my client that he did not have to submit to a polygraph test or for polygraph examination?

A. I don't know that I specifically told him myself; no, sir.

Q. Did you tell him that indirectly?

A. No, I did not tell him.

Q. Okay. Did you ever tell my client that -- strike that. Did my client ever ask if he could have a lawyer?

A. No, sir.

Q. Did my client ever mention the word lawyer to you at all?

A. No, sir.

Q. Attorney or any other designation for persons like myself?

A. No, sir.

Q. Did my client ever tell you that he wanted to have visitors?

A. No, sir, he did not.

* * *

-567-

Q. Lieutenant Campbell spent -- was alone, as you say, approximately fifteen or twenty minutes with Michael White, correct?

A. Yes.

Q. Just as you were coming in, and you didn't return into the room, correct?

A. I believe I did, yes.

Q. And just as you were coming in, do you remember hearing Lieutenant Campbell saying, "Get me the piece and name the price, this is the man," pointing to you, "that can help you?"

A. Well, I remember him saying, "This is the man that can help you."

Q. Do you remember just prior to that, I mean no words in between, saying give me the piece and name the price?

A. Well, I don't recall that, him saying that, no.

Q. Do you then remember saying, "We are running out of time, we are going to Court?"

A. I think I did say that, yes.

Q. It is correct, is it not, Sergeant Hoff, that the things that you said to Michael White throughout this interview were all true, were they not?

A. Yes, sir.

Q. Just so you understand my question, I know that what you said was true, but the substance of your remarks, I am not going

just to the fact you said these particular things, but that what you said then, they were true?

A. Well, when I ran the case facts by Michael White, it was all true, yes. We pretty well had what we thought was the entire picture at that time.

Q. But even, for example, your discussions concerning oh, I don't know, Charlie, Chare Knight or Bobby Jackson or Mildred Perry or the lawyer coming in to talk about Mildred Perry or any of the arrangements or deals or conversations or whatever, anything that you said to Michael concerning those things did in fact occur?

A. No, not entirely.

Q. What didn't?

A. Well, there was no specific deal made with Chare Knight. We knew that he had given us a statement. We had hoped that he would continue and testify for the prosecution, and there would be a point that we would be talking to the prosecutor about that.

Q. Okay. What else wasn't true?

A. Well, I am not sure. Of course, there were a lot of things that we talked about this afternoon. As far as I know, everything else basically was true. Mrs. Perry had not said anything to us, as far as I knew, and just off the top of my head I don't know that

there was anything else that wasn't completely pretty much accurate.

-569-

Q. Sergeant Hoff, then, specifically then, just so that it is clear, were the statements made to Michael White about the arrangements or deals or whatever offered to Bobby Jackson up to that time, were those remarks true?

A. Well, I don't recall that there were any deals or statements made to him other than just prior to that on the way back from the State Police Post when Bobby Jackson asked me as to what might happen. I told him that if he testified, there might be a possibility, after we talked to the prosecutor, of something less than Murder in the First Degree. We also had conversation in that car about whether or not Michael White would make a statement to me.

Q. And he told you what?

A. He told me probably -- not unless I have a chance to talk to Michael White first.

Q. Well, then let me ask, I think this is the last question, famous last words, you indicated on this cross examination before the break that this or something similar was said, "But Charlie, he is cooperating, we are going to let him off, something easy, and even the guy who did the shooting, Bobby Jackson," now you said that that

or something similar was said. You remember that, correct?

A. Well, I just testified something was said to Bobby Jackson just prior to this interview, and I also testified that there was no deal or arrangement made with Chare Knight.

-570-

However, we were anticipating talking to the prosecutor at a later time regarding Chare Knight.

Q. Now in terms of the -- in your answers where you said that you couldn't recall, just so I understand you correctly, you can't recall whether those specific words were said but you do recall that something to that effect was said?

MR. SELLER: Objection.

THE COURT: I think this has been asked and answered.

MR. DURANT: I have no other questions.

THE COURT: You may examine.

REDIRECT EXAMINATION

BY MR. SELLER:

Q. Sergeant Hoff, how long did the discussions last between you and Michael White, Michael White and Lieutenant Campbell, Michael White and Jackson on

the 1st around one o'clock, how long did they last?

A. Well, we began around one-fifty, we terminated about three-thirty, so we are talking about an hour and forty minutes.

Q. Of the hour and forty minutes, how much time did you and Sergeant Garrison spend talking with Mr. White?

A. Probably about an hour and fifteen minutes, twenty minutes.

Q. Of that hour and fifteen minutes or twenty minutes, how much time was spent, would you say, roughly, in laying out the case before hm and telling him where he stood?

-571-

A. Probably twenty, twenty-five minutes.

Q. Now you say you recall something like this being said during that time, "There is the Willetts case in which the shooter testified, Charlie is cooperating, maybe the guy who did the shooting, we have already worked out a deal with the prosecution," do you recall the context in which those things were said?

A. I recall we did mention the Willetts cases. Sergeant Garrison brought that up. We did indicate, in talking with the prosecutor, that for truthfulness something might be worked out.

Q. Was this with regard to Chare Knight and with regard to Mr. Jackson?

MR. DURANT: Your Honor, that is a leading question.

THE COURT: That is all right. I would like to move on. Go ahead.

A. Yes, it was.

BY MR. SELLER:

Q. Why were you telling Mr. White this?

A. Because we were implying that he too -- might be possible if he testified truthfully and cooperated, in talking with the prosecution, the prosecutor might be able to have something less than Murder in the First Degree.

Q. Well, was there any laying out of the case and the evidence

-572-

against Mr. White?

A. Yes. I told him that Bobby Jackson had told us the complete thing. We went through the entire case on a step by step basis. I told him that Bobby Jackson indicated that he had gone, Michael White had gone with him out to the Perry house, had participated, had received some of the money, half of the nine hundred dollars.

Q. I am going to interrupt you. Did you indicate at all whether they, Mr.

Knight and Mr. Jackson, would be testifying against him?

A. I indicated that we had hoped that they would continue to cooperate and testify; yes, sir.

Q. Now you say you recall the words something like, "So what kind of a deal can be worked out at this time?" Did you tell Mr. White whether or not you were working out a deal with him?

A. No, sir, I did not.

Q. Did you make any indication as to whether a deal could be worked out at that time?

A. I told him that we did not have the authority, we could not work it out, it would be up to the prosecutor.

Q. Did you tell him something like, or it seems to me you did say on cross examination, something like, "Millie instigated the entire affair," do you recall something like that?

A. Yes, sir, I do.

-573-

Q. Why were you telling Mr. White that?

A. Because there existed the possibility that the people involved could be prosecuted and the real instigator of the whole thing might end up getting off and we needed some cooperation and help to make sure that didn't happen.

Q. Okay. Thank you. Now did you at any time offer to get Mr. White's bond reduced?

A. No, sir. I may have indicated that and I recall saying that his bond would be very high, but I never at any time indicated I had any authority to set bond, that being the Judge's prerogative.

Q. Did you indicate at all in any way that you were going to go to bat for him to get it reduced?

A. No, sir.

Q. Is it possible that Mr. White at any time asked for a lawyer and that you heard him and didn't do anything about it?

MR. DURANT: Speculation, and I object.

THE COURT: No, he can answer that. You raised the question.

A. No, sir. I don't recall that he requested an attorney at all during that interview.

THE COURT: I think that was testified to on cross. He was asked that on cross and he said no.

TRIAL COURT'S OPINION:

-714-

MR. WILLIS: (Interposing) May I ask a question, Your Honor?

THE COURT: Yes.

MR. WILLIS: Will the Court be addressing the issue of delay in arraignment with respect to Mr. Jackson?

THE COURT: Oh, yes, delay in arraignmet. I will address that. I can address it right now.

I think the basic case on delay in -- oh, you mean in delay --

MR. WILLIS: (Interposing) To extract the confession, and we are namely talking at this point -- well, we are talking at this point about anything certainly occurring on August 2nd and August 1st.

THE COURT: Well, with reference to the delay in arraignment on August 2nd confession --

MR. WILLIS: (Interposing) I shouldn't say August 2nd.

THE COURT: Obviously the Auggust 2nd confession was not given until after the arraignment, so any

-715-

delay in arraignment does not affect

the August 2nd confession of Mr. Jackson.

With reference to the earlier statements, I do not see how there was such delay here as to invoke the doctrine that there was a deliberate holding of the defendant for the purpose of obtaining confessions because the first confession was at twelve-thirty, later confirmed at five-oh-two and at eight forty-eight merely for the purpose of clarifying the five-oh-two confession where there was a bad tape. I think the twelve-thirty confession was not the result of any illegal delay in arraignment, so I will reject that.

SGT. W. HOFF (10 JANUARY 1980):

-49-

Q. Now, sir, you did arrange or come up with a plan in conjunction with other officers that you would get the defendants in this case to give statements about their involvement by using coercion, didn't you?

A. No, sir.

Q. You did plan to confront each of them with whatever you can get out of the other to force them to give or -- strike that -- to encourage them to give a statement, is that right?

A. We didn't plan it, but we did in fact use the statements of other's in an attempt to get a statement, yes.

Q. Now, sir, were you involved -- you know what a warrant request is, of course, right?

A. Yes, sir, I do.

Q. And you heard the testimony about the warrant request from Sergeant Ericson and how it was prepared, is that right?

A. Yes, sir.

Q. Did you have anything to do with that?

A. No, sir.

Q. But you do know that that warrant request had already been prepared before the arraignment day, at least most of it had already been prepared, hadn't it?

A. No, sir, I do not know that.

Q. You didn't see it before that date on Mildred Perry?

A. Yes, I had seen that one.

Q. Yes, and that one is about the same as the one you used against Robert Jackson, isn't it?

A. There are several changes as I recall, but much of it is the same; yes, sir.

Q. When was the first time you saw the warrant request on Mildred Perry?

A. On the evening of July 29th.

Q. July 29th. I see. As an officer in charge, were you telling another officer in charge, like Sergeant Ericson, to hey, take six hours to prepare the same thing all over again?

A. No, sir.

Q. Well, you have already determined that you had enough against Robert Jackson to charge him on July 31st, didn't you?

A. Yes, sir.

Q. And he was being held, though, so that you could get more statements out of him, isn't that right?

A. No, sir.

Q. That is not part of the reason why you were holding him?

A. No. He was being held because he was under arrest for Murder.

Q. Well, yes, okay, fine. Well, he was being held then without being arraigned so you could get more statements out of him, isn't that right?

A. No, sir. We had planned on arraigning him on August 1st, which we did so.

Q. Which you did so?

A. Yes, sir.

Q. I see. You planned to do that at two p.m. or three o'clock p.m. on August the 31st?

A. There was actually no decision made on that date. We were still in the process of conducting interviews until late into that evening.

Q. Well, he had already given you a statement, two of them, at least, in your presence, right, on July -- by midnite the morning of -- by eleven on the night of July 31st, he had already given you two statements to your knowledge, right?

A. Yes, sir, he had.

Q. Taped, right?

A. Yes, sir.

Q. The Courts open up at nine o'clock in the morning, don't they?

A. Yes, sir, they do.

Q. He was arraigned at what time?

A. At approximately four o'clock p.m. on the 1st.

Q. Just before the Court's close, right?

A. Yes, sir.

Q. But you weren't holding him to get another statement or

statements out of him?

A. Not specifically, but we did obtain a statement from him, as I have testified, on August 1st.

Q. Well, before -- as a matter of fact, before Robert Jackson ever opened his mouth, you thought you had enough against him to charge him, didn't you?

A. I'm not sure without his statement that we would have had enough.

Q. I'm sorry. I didn't hear you.

A. I'm not sure if we would have had enough. We did have certain evidence against him, certainly enough to arrest him.

Q. Well, I can appreciate that, sir, but you might not be sure if you did, but see, I am concerned about your state of mind right now so I can move into the next question.

A. All right.

Q. You felt, did you not, before Robert Jackson opened his mouth, that you had enough evidence to charge him already?

A. Yes, I think we would have had enough.

Q. You told him that, didn't you?

A. I don't believe I told him that.

Q. Did anyone tell him that in your presence?

A. Well, it seems to me that that was some of the discussion with Sergeant Ericson during those initial interviews.

Q. During the initial interviews?

A. Yes, sir.

Q. Before he gave a statement?

A. Well, during the -- during him giving a statement.

Q. How about before he gave a statement, was there any such mention?

A. Well, I really wasn't present prior to him not saying anything. When I walked in that first contact with him, he was already answering questions that Sergeant Ericson was asking him.

Q. I am sorry. What was the last part about Sergeant Ericson?

A. Sergeant Ericson had been asking him.

Q. Why, sir, you testified, did you not, that at some point you did offer him something, right?

A. I explained to him what might happen.

Q. What might happen?

A. Yes, sir.

Q. When did you tell him this?

A. It was August 1st at approximately twelve-thirty or one o'clock.

Q. At approximately twelve-thirty or one o'clock. Where was this?

A. This was on the way back from the Michigan State Police post.

Q. What did you tell him?

A. I told him, in response to his question, that a lot of things

could happen. If he would testify truthfully, there might be some possibility, when he gets an attorney and talks with a prosecutor, that he might be charged with something less than Murder in the First Degree.

Q. I see. Up to that point had you told him that he could be given any break?

A. No, sir, I did not.

Q. Had anyone told him that in your presence?

A. No, sir.

Q. Did you tell anybody he would be given a break?

A. No, sir.

Q. Did anyone tell anybody in your presence that my client would be given a break?

A. No, sir.

TRANSCRIPT OF INTERROGATIN OF MICHAEL WHITE (1 AUGUST 1979, 1:50 PM - 3:30 PM):

-1-

HOFF: You're Michael White, is that correct? O.K. Mike, I've identified myself, I'm Sergeant William Hoff and I did talk to you first last night. This is Sergeant Garrison. We're gonna be talking to you about this incident that occurred in Livonia on July 12th...a homicide, O.K., a murder. It's our case number 79022458. I know that doesn't mean much to you but it's the case. Before we started I want to advise you of your constitutional rights and I've done this before, but again I have to do it again. We're required by law each time we talk to you about a criminal matter that we advise you of your rights. Do you understand that?

WHITE: Right.

HOFF: Uh, I want to go thru and read 'em to you, and then I want you to acknowledge that you understand them, fine, if not I want you to tell me you don't. Then I will try to explain them. You have the right to remain silent and not make any statement or answer that may incriminate yourself in any manner whatsoever. Do you understand that?

WHITE: Yes.

HOFF: Secondly, that anything you say can and will be used against you in a court or courts of law for the offense or the offenses concerning which any statement is made. Do you understand that?

WHITE: Yes.

HOFF: Before you can hire or you can hire a lawyer of your choice to be present as I advised you before and during any questioning.

WHITE: O.K. I have a question about that.

HOFF: O.K.

WHITE: O.K. Now when the lawyer is not here things I say gonna be put down if its to be used against me, the exact words or would you put that down on paper or what?

HOFF: Well, if you, you know, we're gonna be asking you questions like we did last night. O.K. And, yeah, if you say things that we might want to use in court, we can do that, O.K. As long as you answer the question. Now, you don't have to answer that question. I've already told you, you know, but thus far you have answered certain questions, but again these are the same rights I gave you the other day, yesterday. Ah, but if you are unable to hire a lawyer, you know of course that you can request and receive an appointment of lawyer by proper authority without cost or charge to you to be present to advise you before and during any questioning. O.K. Do you understand that?

WHITE: Yes, I have a question. No cost. Cause the guys upstairs said that I would have to pay a fee for a court appointed attorney.

HOFF: If a person can afford to pay back, we have a monthly pay-back program of $5 a month or whatever if your employed. If you not employed, you don't have to do that.

GARRISON: Or, let's say a man should go to prison, for some reason, well how can he pay back? He can't pay back. Well the county realizes that, they just take a loss. Let's say a guy all of a sudden tomorrow somebody dies in his family he has X amount of dollars so that's available to pay back the attorney then, they expect you to pay it back.

HOFF: You can refuse to answer any questions or stop giving any statement any time you want to O.K.? No law enforcement officer can prompt you as to what to say during these questions or write out any statement to be used unless you want him to do it. O.K.? I can't write out a statement and say sign this unless you tell me, "O.K., I'll give you permission to write out a statement." These are your rights. Mike, do you understand them? Do you have any questions about any of 'em?

WHITE: Nah.

HOFF: Now, your a fairly intelligent fellow... you've got some college doncha?

WHITE: A little bit.

HOFF: We've put you down for 13 years of school and so you do understand what we've explained to you. I've just read from this form, in fact, just to make sure, why don't you go ahead and read 'em and initial 'em.

WHITE: Read them out loud?

GARRISON: Oh, no, its up to you.

WHITE: I can't read...

GARRISON: O.K. just so long as you can understand them that these are the same rights that were read to you before.

WHITE: I have the right to remain silent and not make any statement or answer or incriminate...

HOFF: Now you don't have to read 'em out loud, just read 'em to yourself, make sure that you understand 'em and initial 'em, just put your initials...[silence]

GARRISON: Today the date is August 1st, 1979, and I'm looking at my watch right now and the time is 1:50 p.m..

WHITE: What?

GARRISON: 1:50, one-five-zero p.m. Sign your name. [silence]

GARRISON: They ask for your address next. [silence]

GARRISON: Now Sergeant Hoff is right here and his name is H-O-F-F.

WHITE: The first one?

GARRISON: Yeah.

HOFF: S-g-t period then H-O-F-F and that's Sergeant G-A-R-R-I-S-O-N.

GARRISON: And as we've told you before we are police officers with the Livonia Police. Do you understand?

WHITE: I-S-O-N?

GARRISON: Yeah, I-S-O-N. G-A-R-R-I-S-O-N. That's O.K. That's close enough.

WHITE: O.K.

GARRISON: Would you sign...

HOFF: I want you to again read the back of the form also. Do you understand that? Put your name where it says here [silence]

WHITE: This where I put my name?

HOFF: Right. [silence]

HOFF: O.K. now, I've fulfilled my requirement under law to advise you of your rights. O.K. Now the only other thing I have to do before I start talking to you is to make sure that you understand your rights. Do you understand them?

GARRISON: Is there anything you don't understand about them?

WHITE: I think I understand. (inaudible)

HOFF: Alright, so you do understand your rights. You have sufficient education to understand what you did sign here, this form, O.K.?

GARRISON: I'm satisfied, officer, that he's aware of his rights.

HOFF: Now, bein' aware of your rights do you want to answer or do you want to talk to us at this time?

WHITE: I mean, I don't know, yeah.

HOFF: You do want to talk or you will answer our questions?

WHITE: (inaudible)

HOFF: Alright. You know I talked to you yesterday, do you recall that, yesterday afternoon, we were in a different room, in fact you did again fill out another similar form, right here, O.K.? We talked about a homicide on Country Club, is that right?

WHITE: (inaudible)

HOFF: Now Michael, a lot has happened since that time. Ah, course you've been held overnight, I told you why you were being held yesterday. That right? I told you you were bein' held on an open charge of homicide, murder? An you're aware of that, right?

WHITE: (inaudible)

HOFF: You've been in custody now with our department for probably what, a little over a day -- day and a half. Within that

time has any of the Livonia Police Officers mistreated you in any way? Given you a bad time?

-4-

WHITE: No.

HOFF: Have you been fed properly?

WHITE: Yeah.

HOFF: O.K. Now we're takin' about an incident that happened back on July 12th, at about 3, 4 in the morning. This was on Country Club. It was the home of a man named Mr. Perry. We're talkin' about a homicide that occurred at that address on that morning. We're talkin' about people going in, going up the stairs, shootin' the man and killin' 'em, O.K.? [silence] Are you familiar with that incident?

WHITE: No, I'm not.

HOFF: You haven't read anything about it? Heard anything about it?

WHITE: Not to my knowledge.

HOFF: Now Michael. I know that you did not do the shooting. O.K. You were not the one who did the shooting. But we do know that you were there. You went... [tape over for 23 seconds]

GARRISON: The fact its all over with. Your involved in a conspiracy. You have a lesser part than some of these other people. I think it behooves you to lay it out exactly what hapened. Now let's get your side of the story this time.

HOFF: You want me to fill you in a little bit?

GARRISON: I think you're going to tell us now. I think you know that we know...

WHITE: Well, what is you askin'?

GARRISON: We're asking you about you takin' part in that murder.

WHITE: I don't know man.

HOFF: Let me tell you what happened. On July 11th your friend Bobby Jackson came by your house with a rented car. He had somebody else in the car with him but he didn't bring that person into your house. He talked to you briefly at your house. Later that day you got in touch with him, and eventually met up with him perhaps about 1:00. You had a small gun, a little automatic. Got in the car and headed out the expressway, Jeffries Expressway, 275, got off at Six Mile. Eventually parked that car on Curtis and decided that was not too good, moved it up onto Country Club, a couple houses south to the Perry house. You got out of that car and went into a garage through an unlocked side door... You started prying a window on a Nova, the window shattered, with a screwdriver. You also pried a door to the house while Mike was kind of... or Bobby was looking around kind of looking out the window. Bobby went in first. He had the gun. Looked around a bit on the lower level, started upstairs. Started looking around through the bedrooms. You came upon this guy, opened the door, turned the light on, seen he was awake, shut

the door. Turn the light on (inaudible). Bobby Jackson heard the commotion. Came down, you were going down the stairs. He started down the stairs, the guy, poked his head around the door and yelled "Get out of here" or somethin' like that. Fired off a shot. You went up when you heard the one shot. Then he went up to the bedroom, another bedroom where Mrs. Perry was, did talk with her. You eventually left the same way, took the CB radio and another little (inaudible), left the house, got back in the car, and drove back to Detroit on Six Mile. You got the gun back.

WHITE: (inaudible)

HOFF: Now let me just throw in a couple other things now. Now, first of all, you know we got it right.

WHITE: You may have but you're wrong about me.

HOFF: We're not wrong about you. We know you were there. The only thing, we've got a lot of people involved in this. O.K., there are five people involved in this whole thing. You're only one of them. You kind of got in on it on the tail end. You didn't do the shooting, of course the main person here you didn't do the planning, the woman set it up which was the wife. She's the one that's really, the person who instigated it, the person who started it right from the start. So you're just a small peg in the whole thing. You're just a part of the whole picture. We know the whole story now, we

know everything, now. You're involved in a murder one, you're gonna be charged shortly, you're gonna be going to court. The only thing now that remains is whether or not you decide to tell us about it, cooperate, see what kind of a deal we can get worked out for you. This is going to be based solely on what... your cooperation here.

GARRISON: Do you know what murder in the first degree carries in Michigan?

WHITE: Life, all day.

GARRISON: All day, all the time, doesn't it. Now last night you told me, hey, you don't care it don't matter to you.

WHITE: How can I win, you know, the truth will come out.

GARRISON: Well, the truth will come out already.

HOFF: The truth is out from other people. Already. You know it is because I can't tell you a story like that that you know is true unless I have the facts.

WHITE: I don't know if the story's true or not.

HOFF: You do know the story's true because you were there. What if I told you you were wearing socks over your hands? [silence]

GARRISON: How does that sound? Huh? How would we know that?

WHITE: I don't know. How would you know it? I don't even know it...

-6-

WHITE: It sounds good.

HOFF: It sounds so good its true, and that's the way it happened. O.K., let me go a litle further. At the shooting, just after the shooting, Bobby Jackson threw you a little plastic zippered bag. When you got in the car you found there was $900 dollars in the bag with some I.D. You guys split that. You got 450, he got 450. [silence] You want to take the whole shot? We don't need anything from you at this point. We don't need a statement from you. We got you now. We got you uptight. You know that. We got it. We don't need you. But on the other hand, we're giving you a chance to make a statement, to come clean with us, get it out in the open. You know...

GARRISON: Once this is off your back and everyone knows about it, your gonna feel a hell of a weight taken off your shoulders. Your stomach is gonna relax a little bit more. It's knowing that we know right now is what's tearing you up.

WHITE: Nothin's tearing me up. (inaudible)

GARRISON: O.K. fine.

HOFF: We know Charlie White, uh Knight was involved in this right from the start. We know what he did. We know it was his idea, as far as settin' up Bobby with the deal.

GARRISON: Charlie Knight as of Sunday night this past week was trying to get money on this damn thing. Was still trying to get the money. We have almost sixty witnesses right now who will be testifying. And one of those witnesses is going to be Bobby.

HOFF: Bobby is the guy that actually did the shooting.

GARRISON: Right now, down in Detroit there is a trial going on, where a man was shot and killed, murdered in from of the Soup Bowl, his name is Willet. He has this enterprise, corporation where they-'re gonna build a restaurant on a boat in the Detroit River that fell through. So the people who lost all their money they went out and got an insurance policy on 'em. And the insurance policy just happened to be the amount of money they lost in this business venture. They hired a guy to knock him off. The man who is testifying right now, for the people, for the people, is actually the guy that did the shooting.

HOFF: The guy that they're... they're really after the people that set the job up. And that's the same in this case. The person that started this whole thing was Mildred Perry.

-7-

CARRISON: We wouldn't be here today if it wasn't for her. Her greed of wanting close to half a million dollars, I believe, was the amount of money, involving an insurance policy, and her husband's property, is what brought this to a head.

They're being separated, the divorce was going to be final 'rond the first of the month which is already here and if that would have happened she would've only got a portion of the property settlement and that's it. She had him killed and she would have gotten the entire package. All the insurance policies would've been double indemnity. So that's her motives for having it done. [pause] Michael just don't shake your head. We wouldn't be... we wouldn't be throwing these things to you if we didn't know the whole entire story.

WHITE: It sounds like you guys have things under control.

GARRISON: Pardon?

WHITE: Sounds like you have everything under control. You've got everything together you know what you gonna do? I got to say that I don't know nothing about anything. I ain't killed nobody.

HOFF: I'll tell ya, the only thing we don't know what we're gonna do. We know that we're going to charge you with murder one. We know that your gonna get arraigned today. We know that the bond will probably be so high that you won't be able to get out. It doesn't have to be, but it's gonna be high. The only thing we don't know at this point is how we're gonna treat you in a couple of weeks down the line when we get down to the circuit court, whether we're gonna let you plead to something less, or whether we're gonna stick with our evidence and nail you all the way up for murder in first degree.

GARRISON: Well, there is only one way to go about it, by his, by his being negative, he's gonna have to go to trial, that's all there is to it. You understand that.

WHITE: Yeah.

GARRISON: The only way you can plead to anything is by knowing that you are guilty of something. One thing is, we want the gun.

HOFF: We know you can help us with that. We know that you got the gun.

WHITE: Yeah, I'd say something like that yesterday. Actually what I told you nothing, that Bobby said you told me about it, I knew about it. [tape over for 17 seconds]

GARRISON: And Charlie is truthful what part he played in to it. He wasn't there. Now if you weren't there, Charlie thinks that you were there, and Bobby says you .ere there with him.

HOFF: Yesterday, Bobby did say, you knew about it. But Bobby at that time didn't say anything more, about you. Today, Bobby said a little bit more.

GARRISON: Now I think you need a brick to hit you against a wall to realize that your in serious trouble here and that the only way that you have any hope is by us. I don't know what your gonna think, how if you want an attorney, I'll tell you what an attorney is gonna tell ya, an

attorney is gonna tell ya don't talk to police. I can tell you that right now. Don't talk to the police. But, the attorney doesn't go to jail, does he?

HOFF: You know what the attorney does when you say that, the attorney know that that's going to get a trial, even if he's appointed he gets paid by how much trial days.

WHITE: If I did tell ya', I'd still go to trial.

GARRISON: No, you wouldn't go to trial. It's not necessary to go to trial. The thing here is there's a gun out, and we need the gun.

HOFF: You know what matters? We're talking not that you're gonna go to jail or not. You're going to jail.

GARRISON: There's no doubt about it.

HOFF: We're talking about how much time you're going to go to jail. Is it going to be three or four years? Is it going to be 20 or 25 or 30 years?

GARRISON: Or a lifetime?

HOFF: That's what we're talkin'. You cooperate and say 'hey, o.k. guys this is the way it was, the gun's over here" That's the only loose end we got. Is the gun. We don't need the gun to convict.

GARRISON: We want the gun off the street.

WHITE: Just cause I was with him that's why I'm involved with it now.

HOFF: That's right. We know you didn't set it up. You went along...

WHITE: I ain't talking about that. I'm talking these other things I got arrested for...

GARRISON: Don't worry about the other thing. That has nothing to do with it. Your here for murder right now. Your arrested for murder.

WHITE: I've been arrested for murder. If I wasn't around, you wouldn't have a case.

HOFF: We would have got you one way or the other.

GARRISON: That's right Michael. We already had him. We already had him but [tape over for one minute and 15 seconds]

HOFF: Michael White went with me that night (static) I had the gun. I went up the stairs first. I was the shooter.

GARRISON: Now we didn't say you were the shooter. He said he was the shooter. The same thing with Charles (static) and the man who pulled the trigger. He's involved in a conspiracy. He's involved in the pre-planning. He's involved in the planning afterwards. And tryin' to obtain the money for you. (static)

HOFF: You've got yourself into a mess Michael. You've got to know that by now. But we're...

WHITE: You got the wrong man....punish myself...(inaudible)

HOFF: Well, you made a mistake then, you went with him and now (static) you went with Bobby Jackson that night...

WHITE: I didn't go anywhere with Bobby.

GARRISON: Well, how you gonna clear yourself man?

WHITE: I'm not gonna even try.

GARRISON: Oh, not gonna try, eh? You gonna go with murder one. That what your gonna do? (static)

HOFF: We're gonna let the shooter, Michael....

WHITE: Ah, I'll just, you know, get myself a lawyer, and pull myself together because I ain't did nothing.

HOFF: You're with a guy who pulled the trigger and said (static) and tell me that's murder. You know darn well. You know Mike, you're gonna go....if you keep that stance that you are at right now and not tell us we're gonna go to trial and convict you as simple as that. You're gonna end up going on the original charge and probably Mrs. Perry gonna go on a regular charge, but Charlie, he's cooperating, we're gonna let him off with somethin' easy. And even the guy that did the shooting, Bobby Jackson.

GARRISON: See, it's the old story that the train is pulling out of the station, somebody is gonna be on the train and

somebody is gonna be off the train. If you want to be on the train, now is the time to do it.

HOFF: We don't...we don't want a statement from Mildred Perry. We got her uptight. We got her...

GARRISON: We refuse to talk. Her attorney...

HOFF: We won't even talk to her...

GARRISON: ...was in here yesterday and we won't even talk to 'em.

HOFF: She wants to cut a deal right now. In fact you know what she wants to tell us? I'll tell you what she wants to tell us. She wants us to say, "hey, o.k. guys, yeah I did hire a couple of guys, but all I wanted them to do was to beat up my husband. I didn't think, I had no idea for the world that they wanted..."

GARRISON: This is what her attorney sort of implied and this is what we heard...

HOFF: That's gonna be the defense.

GARRISON: Before the arrest (static)

HOFF: We're not gonna buy that because we've got enough evidence, we know that she wanted her husband dead. She paid money, we got a lot of evidence. Got a lot of physical evidence. She made a lot of mistakes. You guys made some mistakes. So hey, you want to lay it out for us?

We'll take a statement and get this thing resolved...We want that gun. (static) ... the murder gun.

GARRISON: The whole story here is this, buddy. Now I'm not going to sit here cause I don't have the time or patience. I have to work a lot of long hours. What we want is the murder gun. In consideration of the murder gun, we may do something fo. you then.

HOFF: I'll tell you right now.

GARRISON: Otherwise, the heck with you. If we gotta go to trial, another thing about that, if we have to go to trial on Mildred Perry, most likely we're going to because we aren't going to talk to her we're not going to give her any plea, her attorney's already been paid $10,000, its my understanding, to go to trial. We gotta go to trial on one its just as easy to go to trial on two. O.K.? O.K. now I told you about the train coming out of the station. About your playing games. Either your going to be on it or your not going to be on it. Now, this is it I'm gonna walk out of here with it. In two minutes you either make up your mind now or I'm walking out and that's it. Now I'll appreciate it if you say one way or another you want to get on the train or you don't want get on the train. Let me know now. I had to go to court and get a search warrant to get some handwriting from her because of some evidence we got last night where she wrote a letter to somebody about this. Now Michael, you've got some sense in your head and you know we are not playing games with you. It's up to you, how many years you want to

stay is up to you buddy. Think of your family...and think of down the road a little bit. Don't think about today. Think the long way down the road a little bit. Three to five years is a long time. Three years. When you were gone, 24 months I think it was, that was a long time. Twenty-five years is even worse, a lifetime is even worse. Now you want to help us, or not?

WHITE: (inaudible) ...help you, right here, what do you want to know?....just the other day, you didn't even pay no attention to that.

GARRISON: What did you say?

WHITE: I said, I said if I could try to find out something for you...

-11-

GARRISON: You are not tryin' to, look, you're trying to pull a smoke over me buddy, I'm telling you the straight skinny. I telling you the straight level. [tape over for 24 seconds] Why should I screw around with this for?

WHITE: I mean, I got the patience. You got me locked up.

GARRISON: What do want me to do, sit down here and say that you kept repeating to me, "Hey I didn't do it", "I didn't do it", when we know that you did it?

HOFF: How much time did I spend with you yesterday? I talked with you for maybe an hour and a half, right? Yesterday I didn't know too much. Today I know a lot

more. And I do know that you weren't the shooter. Yesterday I, I, I started thinkin' you might be the shooter but I didn't have a lot of information, today, I got lot more. I

ARRAIGNMENT (1 AUGUST 1979):

-12-

(The defendants were brought into the courtroom at this time.)

THE COURT: The case of the People versus Mildred Vernell Perry, Chare Anthony Knight, Robert Bernard Jackson, and Mike G. White. You are each charged on date of July thirteen, 1979, at 17938 Country Club in the City of Livonia, the County of Wayne, the State of Michigan, with count one, conspiracy to murder; count two, murder, first degree, premeditation; count three, possession of a firearm in the commission of a felony. Under count one, you did wickedly, maliciously and feloniously conspire, combined, confederate and agree together and with each other, and with diverse other persons for the purpose and with intent then and there to commit the crime of murder, first degree; contrary to Section 750.157(a) of the Michigan Compiled Laws Annotated, and Section 750.316 of Michigan Compiled Laws Annotated.

Count two, feloniously, deliberately, wilfully, and with malice aforethought and with premeditation did kill and murder one Rothbe Elwood Perry, contrary to Section 750.316 of Michigan Compiled Laws Annotated.

Count three, did then and there carry or have possession of a firearm, to-wit: a twenty-five caliber automatic pistol, in the commission

or attempt to commit a felony, to-wit: murder, contrary to Michigan Compiled Laws Annotated, 750.227(b).

These are the charges. They are all felonies.

To the charge of possession of a firearm in the commission of a felony, count three, how does Mildred Vernell Perry plead?

MR. BOCKOFF: Stands mute, Your Honor.

THE COURT: The Court will enter a plea of not guilty. As to Mildred Vernell Perry on County two, conspiracy to murder, how does the defendant plead?

MR. BOCKOFF: She stands mute, Your Honor.

THE COURT: Count one, murder in the first degree, how does the defendant, Mildred Vernell Perry plead?

MR. BOCKOFF: She stands mute, Your Honor.

THE COURT: The Court will enter a plea of not guilty. Chare Anthony Knight, as to the charge of possession of a firearm in the commission of a felony, how do you plead?

MR. KNIGHT: Stand mute.

THE COURT: The Court will enter a plea of not guilty. To the charge of Conspiracy to Murder, how do you plead?

MR. KNIGHT: Stand mute.

THE COURT: The Court will enter a plea of not guilty. As to the charge of murder in the first degree, Chare Anthony Knight, how do you plead?

MR. KNIGHT: Stand mute.

THE COURT: The Court will enter a plea of not guilty. Robert

Bernard Jackson, to the charge of possession of a firearm in the commission of a felony, how do you plead?

MR. JACKSON: Stand mute, sir.

THE COURT: The Court will enter a plea of not guilty. Robert Bernard Jackson, to the charge of conspiracy to murder, how do you plead?

MR. JACKSON: Stand mute.

THE COURT: The Court will enter a plea of not guilty. Robert Bernard Jackson, to the charge of murder in the first degree, how do you plead?

MR. JACKSON: Stand mute.

THE COURT: The Court will enter a plea of not guilty. The case of People versus Mike G. White on a charge of possession of a firearm in the commission of a felony, how do you plead?

MR. WHITE: Stand mute.

THE COURT: The Court will enter a plea of not guilty. Mike G. White, to the charge of conspiracy to murder, how do you plead?

MR. WHITE: Stand mute.

THE COURT: The Court will enter a plea of not guilty. The case of the People versus Mike G. White, on a charge of murder in the first degree, to that charge, how do you plead?

MR. WHITE: Stand mute.

THE COURT: The Court will enter a plea of not guilty. In the case of the people versus Robert Bernard Jackson, and Michael White, and Charles Knight, you have each filled out an affidavit for appointment of counsel. Will each of you raise your right hand. Do you swear or affirm that the statements made in these affidavits for appointment of counsel are all true?

(Defendants responded.)

THE COURT: You each indicate yes. The Court will recommend appointment of counsel in each case. I'll set examination date. I'll tentatively set

it for the ninth of August at 1:30. If your counsel wish adjournment at that time, then you may have an adjournment.

MR. BOCKOFF: May I respectfully address the Court?

THE COURT: Yes.

MR. BOCKOFF: How will I be apprised of who the other representatives of the defendants are so that I may communicate with them?

THE COURT: You may ask the Court Clerk as soon as she is notified, or ask her when she sends or calls for appointment of counsel to notify your office of the parties, or to have the Circuit Court notify your office of parties that are appointed.

MR. BOCKOFF: Thank you. Thank you, Your Honor.

THE COURT: This being a charge of murder in the first degree, all defendants are remanded to jail without bond.

MR. BOCKOFF: Would it avail counsel to address the Court on the subject?

THE COURT: No.

MR. BOCKOFF: Very well. Your Honor, may I suggest to the Court that there has been presently an outstanding complaint and

warrant against Mildred Perry arising out of the same facts and circumstances charged. And now, which complaint and warrant is she to face?

THE COURT: That will be dismissed and this is the warrant that we will proceed to examination and trial on.

MR. BOCKOFF: Is there presently an order of dismissal or is the Court now entering an order of dismissal?

THE COURT: I am verbally entering it, and the police department will bring it in and prepare it or you may prepare it if you wish it signed.

MR. BOCKOFF: No. I accept -- I accept the Court's order.

THE COURT: All right.

MICHIGAN COURT OF APPEALS OPINION

This item was contained in the Appendix to the Petition for Certiorari filed by Petitioner.

MICHIGAN SUPREME COURT OPINION

This item was contained in the Appendix to the Petition for Certiorari filed by Petitioner.

84-1531

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

THE PEOPLE OF THE STATE OF MICHIGAN,
PETITIONER

vs.

ROBERT BERNARD JACKSON,
RESPONDENT

ON WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

BRIEF FOR PETITIONER

JOHN D. O'HAIR
Prosecuting Attorney
County of Wayne

TIMOTHY A. BAUGHMAN
Deputy Chief,
Civil and Appeals

A. GEORGE BEST II (P-27749)
Assistant Prosecuting Attorney
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5827

QUESTION PRESENTED

DID THE MICHIGAN SUPREME COURT INCORRECTLY HOLD THAT A STATEMENT GIVEN TO POLICE BY A DEFENDANT AFTER HE HAD BEEN ARRAIGNED ON A WARRANT AND AFTER HE WAS PROPERLY GIVEN THE MIRANDA REQUIRED WARNINGS, MUST BE SUPPRESSED BECAUSE COUNSEL WAS NOT PRESENT PRIOR TO THAT STATEMENT BEING GIVEN AND BECAUSE THE POLICE DID NOT ADVISE THE DEFENDANT OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL?

TABLE OF CONTENTS

INDEX OF AUTHORITIES

OPINIONS BELOW

The Opinion of the Michigan Court of Appeals is reported at 114 Mich App 649 (1982); ___ NW2d ___ (1982). The Opinion of the Michigan Supreme Court is reported at 421 Mich 39 (1984); ___ NW2d ___ (1984).

STATEMENT OF JURISDICTION

The opinion of the Michigan Supreme Court was released on 28 January 1985. The jurisdiction of this Honorable Court is invoked under and pursuant to 28 USCA 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part that:

> In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

ROBERT JACKSON was convicted of second degree murder and conspiracy to commit second degree murder. His conspiracy conviction was reversed on appeal by the Michigan Court of

Appeals but his substantive second degree murder conviction was affirmed. People v Jackson, 114 MichApp 649 (1982).

JACKSON gave a total of seven confessions after his arrest. Three on the day of his arrest, one the following day after failing a polygraph. A fifth and sixth statement were also then taken by the arresting officer. JACKSON was then arraigned on the Complaint and Warrant. The arraigning magistrate, ascertaining that JACKSON was indigent, agreed to appoint counsel for him. The final and seventh statement was taken the next day (taped). (See Appendix to Petition for Certiorari, pages 46-49, 91- 97).

The trial theory of the Petitioner was that the wife of the deceased hired Jackson and Knight to kill her husband to receive substantial insurance benefits.

SUMMARY OF ARGUMENT

Where a defendant specifically requests the assistance of counsel before talking to the police, interrogation must cease. Counsel must either be provided or the defendant must be shown to have both reinitiated contact and to have waived the presence of the earlier requested counsel. A mere assertion by a defendant at the arraignment on the complaint and warrant of a desire to have appointed defense counsel, although sufficient to cause the Sixth Amendment right to attach, is not a specific assertion of the right to the presence of counsel at all further police-defendant contacts.

Where a defendant, after arraignment on the Warrant and after having made a request for appointed counsel, has been fully advised of his Miranda rights and has decided to continue to cooperate with the police, the Miranda waiver fully protects whatever Sixth

Amendment counsel right the defendant may have. As noted by the Michigan Supreme Court, "the average person" is not generally sophisticated enough to recognize or understand the fine distinctions between Fifth and Sixth Amendment counsel rights. (Slip Opinion, 16). Thus, a Defendant's awareness of his Fifth Amendment right to counsel suffices in and of itself to protect his Sixth Amendment rights. The record in this case established both that JACKSON was repeatedly given his Miranda warnings and that he repeatedly waived the right to counsel enunciated in those warnings. The insertion of yet another layer of "official" advisement (and an unidentified advisement at that) would thus be totally meaningless. The Michigan Supreme Court did not set forth what additional warnings the police must provide after arraignment to obtain a "valid" Sixth Amendment waiver. Thus, the situation now obtains that not only do

the police not know how to advise a defendant after arraignment but, the defendant is recognized as being generally unable to understand that additional advice even if given.

ARGUMENT

THE MICHIGAN SUPREME COURT INCORRECTLY HELD THAT A STATEMENT GIVEN TO POLICE BY A DEFENDANT AFTER HE HAD BEEN ARRAIGNED ON A WARRANT AND AFTER HE WAS PROPERLY GIVEN THE MIRANDA REQUIRED WARNINGS, MUST BE SUPPRESSED BECAUSE COUNSEL WAS NOT PRESENT PRIOR TO THAT STATEMENT BEING GIVEN AND BECAUSE THE POLICE DID NOT ADVISE THE DEFENDANT OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL.

The question presented in this case is simply this: where a defendant has been formally charged and arraigned on a warrant[1],

---

[1] In Michigan a criminal defendant may have formal charges lodged against him in one of two ways. He may be indicited by a grand jury with criminal charges laid by the return of a true bill or he may be charged by the submission by the police of a request for a complaint and warrant to the local county prosecutor. Upon the submission of such a document, the county prosecutor reviews it and, if convinced that a crime has occurred and

has been repeatedly given the required Miranda warnings and has repeatedly waived his right to remain silent and his right to have an attorney present, does the giving of the Miranda warnings alone provide sufficient protection of his Sixth Amendment right to counsel and is his waiver of the Miranda advisements a sufficient waiver of his Sixth Amendment right to counsel?

---

[1] that the named individual has probably committed it, formally recommends that a magistrate sign the complaint. If the magistrate signs the complaint, it then becomes a warrant. The accused is then brought before the magistrate and is arraigned on the warrant. At that time, he is told by the magistrate what he is charged with and is advised of his rights as a defendant. He is given his Miranda rights and, if indigent, the magistrate will order the appointment of counsel. The appointment of counsel takes place some time after the appointment is ordered and not at the time of the arraignment. It is this latter procedure which was used in this case. After a defendant is arraigned on the warrant, a preliminary examination is held within 12 days. If the defendant is bound over for trial at the conclusion of that examination, the warrant becomes the charging information and the defendant is then arraigned on that information.

The Michigan Supreme Court answered this question in the negative.

The Court found that the Sixth Amendment right was "considerably broader" than the Fifth Amendment right and that "(n)either the United States Supreme Court nor this court has delineated specific procedural requirements for waiver of the Sixth Amendment right to counsel". (App. to Cert. Pet., Page 57). The Court found that "no consistent approach to the waiver problem has emerged" (App. to Cert Pet., Page 75), and held that:

> We decline to follow the reasoning of those cases which have found valid Sixth Amendment waivers after a request for counsel has been made to a magistrate based solely on waivers of Miranda rights.
>
> * * *
>
> We need not decide at this time whether stricter procedural standards for waiver of the Sixth Amendment right to counsel are required. We need only hold here that, at a minimum, the Edwards/Paintman rule applies by analogy to those situations where an accused requests counsel before the arraigning magistrate. Once this request occurs, the police may not conduct further interrogations until counsel has been

> made available to the accused, unless the accused initiates further communications, exchanges, or conversations with the police. If a defendant chooses to reinitiate communications, he must be sufficiently aware of both his Fifth and Sixth Amendment rights to effectuate a voluntary, knowing, and intelligent waiver of each right. (App. to Cert. Pet., Page 81-82, emphasis in original).

The Court found that JACKSON requested appointed counsel at the arraignment on the warrant only because he was "financially incapable of retaining an attorney" and was unwilling to represent himself" (App. to Cert. Pet., page 55), and held that the trial court was correct in its decision that JACKSON had never invoked his Fifth Amendment right to counsel prior to or after arraignment on the warrant and had waived that right to counsel after arraignment on the warrant.

The Petitioner admits that JACKSON'S Fifth Amendment right to be free from self-incrimination and the associated right to counsel had attached at the time his seventh confes-

sion was given. Miranda v Arizona, 384 US 436, 86 S.Ct. 1602, 16 LEd 2d 694 (1966); Edwards v Arizona, 451 US 477, 101 S.Ct. 1880, 68 LEd 2d 378 (1981). The Petitioner also admits that JACKSON'S Sixth Amendment right to counsel had attached at the arraignment on the warrant where he asserted indigency and requested the appointment of trial counsel. Estelle v Smith, 451 US 454, 101 S. Ct. 1866, 68 LEd 2d 359 (1981); Kirby v Illinois, 406 US 92 S.Ct. 682, 32 LEd 2d 411 (1972); United States v Gouveia, ___ US ___, 104 S.Ct. ___, 81 LEd 2d 146 (1984). The Petitioner denies however that the request for the appointment of counsel by JACKSON at his arraignment on the warrant was an assertion of his right to the present assistance of counsel or was an assertion of his desire not to be questioned further. The facts of this case affirmatively establish that JACKSON had no objection to further communications with

the police.[2]

The Petitioner also recognizes the fundamental difference between the interests protected by the Fifth Amendment versus the Sixth Amendment right to counsel. As noted in Estelle v Smith, supra, the primary purpose of the

---

[2] As a review of the totality of the confession voluntariness hearing conducted by the trial court readily reveals, JACKSON clearly desired to converse with the police over the two day period involved here. The record reveals that he wanted to "feel out" the police in terms of what information they possessed, what he could possibly get from them in exchange for information possessed by him and, initially, tried to convince the pol- ice that only his co-defendants were involved in the killing. At one point, JACKSON even met with a co-defendant and attempted to con- vince him to cooperate with the police and provide information against the initiator of the scheme. JACKSON simply thought that he could trick the police into redirecting their attention from him to another and, when that failed, try to obtain a deal lessening the time he would serve if convicted. JACKSON'S actions reveal a man who, while he may have desired the assistance of an attorney at trial, was well aware of his right to counsel during interrogation but did not want such assistance.

Fifth Amendment is to secure to an in-custody accused the right not to be forced to incriminate himself. (371-372). See also Miranda, supra; Kirby, supra; Rhode Island v Innis, 446 US 291, 100 S.Ct. 1682, 64 LEd 2d 297 (1980); and Wyrick v Fields, 459 US 42, 103 S.Ct. 394, 74 LEd 2d 214 (1982), Justice Marshall in dissent at 222, Cert. Den. After Remand, ___ US ___, 104 S.Ct. 556, 78 L Ed2d 728 (1983). The "core purpose" of the right to counsel contained in the Sixth Amendment however, is the guarantee of the assistance of counsel at a trial "when the accused is confronted with both the intricacies of the law and the advocacy of the public prosecutor." Gouveia, supra, at 154, citing United States v Ash, 413 US 300, 93 S.Ct. 2568, 37 LEd 2d 619 (1973). Where a pre-trial Sixth Amendment right has been found to attach, it has been found to do so because "the accused [is] confronted, just as at trial, by the

procedural system, or by his expert adversary, or by both." (Gouveia, supra, at 155). The Sixth Amendment right to counsel was neither designed nor intended to cover situations involving "normal" pre-trial police-defendant interrogations.

The Michigan Supreme Court mixed Fifth and Sixth Amendment concerns and arrived at a new rule that serves only to inhibit routine and acceptable police investigatory practices while at the same time impinging on the ability and right of a defendant to communicate with the police after arraignment on the warrant.

FEDERAL AUTHORITIES

Federal courts have reached differing results where this question has been addressed. In United States v Satterfield, 558 F2d 655 (CA2-1976), the indicted defendant was arrested, and given his Miranda warnings, and made a statement. He was then taken to a U.S. At-

torney's office, re-Mirandaized, again made a statement, was then arraigned at which time he requested the appointment of counsel. The following day he was again given his Miranda warnings and gave a third statement. The Second Circuit held that unless the defendant had waived his Sixth Amendment rights, his confessions were inadmissible. The Court noted that the defendant was "distraught, weeping and obviously out of control". (657). Even were the statements voluntary under the Fifth Amendment, they were involuntary vis a vis the Sixth Amendment. The Court did not discuss the question of waiver under the Sixth Amendment, implying that were the defendant "not out of control", the valid Fifth Amendment waiver would have been sufficient to waive his Sixth Amendment rights.

That standard Miranda warnings can result in the waiver of Fifth and Sixth Amendment rights was made clear in a later Second Cir-

cuit Court case, United States v Lord, 565 F2d 831 (CA2-1977). In Lord, supra, the indicted but as yet unrepresented defendant:

> was orally advised of his Fifth and Sixth Amendment rights upon arrest. He read and signed the standard 'advice of rights' form and a waiver form. Unlike the defendant in United States v Satterfield, supra, Schwartz was not an individual "distraught, upset, weeping and obviously out of control" while in custody. (840).[3]

In Carvey v LeFevre, 611 F2d 19 (CA2-1979), the indicted defendant was met by a police officer and asked to talk about the incident of the indictment. While providing the Miranda warnings, the officer did not tell the defendant that he had already been indicted. The Court held that the indictment had established the attachment of the Sixth

---

[3] If the "standard advice of rights form" signed by the defendant in Lord, supra, is anything like that used in Michigan, it contains an explicit statement that the defendant has the absolute right to the assistance and presence of counsel. (See United States v Woods, 613 F2d 629, 632-634 (CA6-1980).

right to counsel and that no waiver of that right had been shown. That finding was based on the officer not having told the defendant of the existance of the indictment. (Cf. United States v Payton, 615 F2d 922, 924 (CA1-1980), defendant told he was under indictment, given full Miranda warnings and then made incriminatory statements. Held to have waived Sixth Amendment rights.) While the Court did not accept the proposition that Miranda warnings were necessarily a sufficient waiver of Sixth Amendment rights it also did not rule that the Miranda warnings will never suffice to waive Sixth Amendment rights..

> What might suffice to comply with Miranda will not necessarily meet 'the higher standard with respect to waiver of the right to counsel that applies when the Sixth Amendment has attached.' (Emphasis added, 22.)

In United States v Mohabir, 624 F2d 1140 (CA2-1980) the Court asked, "under what circumstances [will] an indicted defendant be

deemed to have waived his right to counsel at [an] interrogation by a prosecutor." (1141).

After indictment but before securing counsel, Mohabir was interrogated by an Assistant U.S. Attorney who gave Mohabir a copy of the indictment and advised him of his Miranda rights. (1145). The defendant then answered every question posed and, in response to being asked if he wanted counsel appointed, answered "yes". The Court noted that there was no assertion that the statements were involuntary under the Fifth Amendment but held that "waivers of Sixth Amendment rights must be measured by a 'higher standard' than are waivers of Fifth Amendment rights." (1146).4

---

4 This "higher standard" concept was based on a dissent authored by Judge Friendly in United States v Massimo, 432 F2d 324 (CA2-1970):

> Warnings by law enforcement officers and subsequent action by the accused that might suffice to comply with Fifth Amendment strictures against testimonial compulsion would not necessarily meet what I regard as the higher stand-

The Mohabir Court held that an indictment was a "critical stage" and that special attention must be paid to making sure that the defendant was aware of his Sixth Amendment rights and of what he was waiving by continuing to talk to the interrogating U.S. Attorney. The Court specifically found that Mohabir "did not understand the gravity of his position". (1149). The Court then noted that notwithstanding the existance of this "critical stage":

> the government urges that a prosecutor in his own office, without any explanation to establish understanding of the Sixth Amendment right, may question an uncounselled, indicted defendant in order to obtain a confession of guilt, and may do so even after...the prosecutor knows counsel will be appointed by the court within the hour. (1151).

On these specific facts the Court found the Miranda warnings alone to be insufficient. The Court found that, "[s]ome additional indication was required that appellant understood the nature and importance of the Sixth Amendment right he was giving up." (1151).

In Blassingame v Estelle, 604 F2d 893 (CA5-1979), the defendant at arraignment, was advised by the magistrate of his right to counsel. The defendant requested that counsel be appointed for him, the magistrate so ordered. After the arraignment but before counsel was appointed, the defendant was interrogated by the police, was given his full Miranda warnings, indicated he understood them, and made a statement. Counsel sought to suppress that statement asserting as one basis

---

4 ard with respect to waiver of the right to counsel that applies when the Sixth Amendment has attached....Indeed, in the case of a federal trial there would seem to be much ground for outlawing all statements resulting from post-arraignment or indictment interrogation ...in the absence of counsel when the questioning has no objective other than to establish the guilt of the accused, even if the Sixth Amendment does not require so much. (Emphasis added, 1174.)

that the defendant had requested counsel at the "magistrate's hearing", had not met with counsel prior to the interrogation, thus the statement could not be used as evidence.

The Fifth Circuit found that:

> the crucial inquiry is whether defendant asserted his right to counsel in such a manner that later police inquiry 'has impinged on the exercise of the suspect's continuing option to cut off the interview'. Nash v Estelle, 597 F2d 513, 519 (5th Cit. 1979)
>
> * * *
>
> Nash recognizes that some defendants may well wish to have an attorney to represent them in legal proceedings, yet wish to assist the investigation by talking to an investigating officer without an attorney present. 'While the suspect has an absolute right to terminate the station-house interrogation, he also has the prerogative to then and there answer questions, if that be his choice.'....To hold that a request for appointment of an attorney at arraignment would bar an investigating officer from later finding out if defendant wishes to exercise this prerogative would transform the Miranda safeguards ...'into wholly irrational obstacles to legitimate police investigative activity and deprive suspects of an opportunity to make informed and intelligent assessments of their interests.' Michigan v Mosley, 423 US 96, 96 S.Ct. 321, 46 LEd 2d 313 (1975).

> Therefore, we hold that the request for an attorney at arraignment does not prevent subsequent station-house interrogation where the request at arraignment is not made in such a way as to effectively exercise the right to preclude any subsequent interrogation. (Emphasis added, 896.)

The above cases are pre-Edwards v Arizona, supra. Edwards itself was solely a Fifth Amendment case. (383, fn. 7).

In Edwards, supra, an arrest warrant had been issued upon a complaint having been lodged in the state court. Edwards was arrested and given his Miranda rights. He explicitly wanted to "make a deal" but only after first obtaining an attorney. Questioning stopped. The next day however, and prior to an attorney having consulted with him, the police came to see him and told him that "he had" to talk to them. He was again Mirandaized and confessed. The United States Supreme Court found that:

> If the accused indicates that he wishes to remain silent, 'the interrogation must cease.' If he requests counsel,

'the interrogation must cease until an attorney is present'.

Although a waiver of the right to first consult with an attorney is possible, that waiver must be shown to have been a voluntary, knowing, and intelligent relinquishment or abandonment of a known right or privilege. The determination of the existance of a waiver depends upon the particular facts and circumstances of the individual case. (385, citing Johnson v Zerbst, 304 US 458, 58 S.Ct 1019, 82 L Ed 1461 (1938).) In addressing the question of waiver, the Court held that:

> although...after initially being ad vised of his Miranda rights, the accused may himself validly waive his rights and respond to interrogation... the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused... having expressed his desire to deal with the

> police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police. (386).

The analytical framework of Edwards is clear: where an accused has clearly "expressed his desire to deal with the police only through counsel", that counsel must be provided before interrogation continues or the defendant himself must re-initiate contact. The Edwards rule is of factual necessity a custodial interrogation rule which addresses only those situations where the defendant clearly does not want to talk to the police. As made clear in cases construing Edwards, supra, it did not create a per se rule of exclusion but required addressing the question of waiver in light of the facts of each case . Wyrick v Fields, 459 US 42, 103 S.Ct. 394, 74 L Ed 2d 214 (1982); Oregon v Bradshaw, ___ US ___, 103 S.Ct. ___, 77 L

Ed 2d 405 (1983), (the Edwards rule was a "prophylactic rule, designed to protect an accused in police custody from being badgered by police officers". (411).)

As stated in Smith v Illinois, 469 US ___, 105 S.Ct. ___, 83 L Ed 2d 488 (1984):

> This 'rigid' prophylactic rule...embodies two distinct inquiries. First, courts must determine whether the accused actually invoked his right to counsel....Second, if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked. (494).

At this point, the Smith court made reference to People v Krueger, 82 Ill 2d 305, 412 NE2d 537 (1980) and its language that not "every reference to an attorney, no matter how vague, indecisive or ambiguous, should constitute an invocation of the right to counsel." In United States v Jardina, 747 F2d 945 (CA5-1984) the court noted that, "The word 'attorney' has no talismanic qualities.

A defendant does not invoke his right to counsel any time the word falls from his lips." (949).

The question that must initially be asked under Edwards is, did the accused invoke his right to counsel? If he did, were any subsequent communications initiated by him and, if so, did he validly waive his Fifth Amendment protections. Federal and state cases following Edwards began to mix its Fifth Amendment analysis with that relating to the Sixth Amendment, ultimately resulting in the decision of the Michigan Supreme Court now challenged.

In Jordan v Watkins, 681 F2d 1967 (CA5-1982). The defendant was arrested, transported to the local FBI office and advised of his Miranda rights. He stated that he understood his rights and made a confession during a second interrogation after again being advised of his rights. He was then arraigned

at which time the court inquired if he desired the appointment of counsel to which he responded "yes, at this time". (1071). He was returned to the local jail, photographed, and fingerprinted. During this booking procedure an investigator asked him if he would like to talk. The defendant, again advised of his Miranda rights, indicated he understood them, and gave a tape recorded statement substantially similar to that given earlier. At no point did Jordan ever request the presence of an attorney or express a desire that the questioning be stopped.

> In the instant case, Jordan never requested the assistance of counsel with respect to custodial interrogation; he merely told the judge that he would like appointed counsel to assist him in further judicial proceedings. In Edwards, the expressed desire to deal with the police only through counsel was made to the police during a custodial interrogation session. Unlike Edwards, Jordan never 'invoked his right to have counsel present during custodial interrogation' or 'expressed his desire to deal with the police only through counsel.' Moreover, he expressed no reluctance to speak with his

> interviewers, and he never attempted to cut off questioning. (1073).

After citing Blassingame, supra, the Court found Jordan's request for the appointment of counsel at the arraignment was "unrelated to the Fifth Amendment based right to confer with or have counsel present before answering any questions." (1074).

> Notwithstanding that Jordan did not invoke his right to counsel with respect to custodial interrogation ...the confession at issue would not have been admissible unless the state proved that Jordan waived his right to counsel, and that the waiver was voluntary, knowing and intelligent. An express written or oral statement of waiver of the Fifth Amendment right to remain silent or of the right to counsel is neither necessary nor always sufficient to establish that an accused's waiver was voluntary, knowing and intelligent.
>
> * * *
>
> Obviously, the validity of a waiver in any case must be determined by analyzing 'the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused. (1074).

Jordan's waiver was found to be knowing, voluntary and intelligent. The Court stressed that:

> Prior to making the recorded confession, appellant had been advised of his Miranda rights at least four times.... [w]hen he was asked if he understood his rights during the second recorded interview session he responded, "Yes, I do."....[W]e must conclude that a waiver must be inferred from the appellant's actions and words. (1074).

Based on these factors, the Court found Jordan to have waived his Sixth Amendment right to counsel by the waiver of his Fifth Amendment rights. (1075). See also United States v Shaw, 701 F2d 367, 380 (CA5-1983); and Jardina, supra.

The Second Circuit in United States v Brown, 699 F2d 585 (CA2-1983) held inadmissible a statement taken from the defendant one hour after his indictment but an hour before his arraignment on the indictment and prior to defendant ever meeting with counsel or a waiver being shown. In Brown, supra, the defendant would have had "counsel appointed for him within the hour upon arraignment". (588). The Court cited to Mohabir, supra, and

found that although a waiver was possible, the government must meet a "heavy burden" establishing that waiver in accord with the "higher standard" applicable in Sixth Amendment situations. This "heavy burden" would not be met by simply showing that the Miranda warnings had been given. (590). This rule was given apparently a per se application.

The Fourth Circuit in United States v Clements, 713 F2d 1030 (CA4-1983) has held that where the Sixth Amendment right to counsel has attached to a defendant under indictment. Where that right has attached, a "stricter standard of review" must be used to determine if that right was waived than that standard used in the Fifth Amendment context. (1034). The Court cited to Satterfield, supra, and to Brown, supra, making the blanket (and amazing) statement that any police questioning after an indictment has been returned "is not legitimate investigation, but

[is] a species of discovery." (1034). Although not prohibiting such questioning, the Court held that it must comport with the dictates of the Sixth Amendment. To waive that right, it must be shown that "an accused was offered counsel but intelligently and understandingly rejected the offer." (1034):

> A valid waiver of Sixth Amendment counsel must be the voluntary act of the defendant free of coercion, physical or psychological, subtle or overt....The defendant must realize that his or her actions are a waiver of a constitutional privilege....Most importantly for this appeal, the defendant must know what constitutional right he or she is waiving, and possess some basic understanding of the meaning of that right. (1035).

The Court discussed the Second Circuits "strictest rule," compared it to the somewhat less emphatic rule of the First Circuit, and to the decisions of the Fifth Circuit which it found to be located "at the other end of the spectrum". (1035- 1036). The Fourth Circuit refused to adopt either the "strict" rule or that used by the Fifth Circuit, instead

holding that:

> in order for a waiver of Sixth Amendment counsel by an individual who has been indicted already to meet the constitutional requirements of knowledge and comprehension, that individual at a minimum must be informed that he or she is under indictment, unless the individual has actual or constructive knowledge of the indictment. (1036).

In United States v Campbell, 721 F2d 578 (CA6-1983), an indicted, arraigned defendant was given his Miranda rights and, notwithstanding that counsel had been appointed at his arraignment some "thirteen minutes" earlier, was interrogated and an incriminating statement obtained. The government argued that Jordan, supra, should control. The Sixth Circuit however held that under Edwards, there would have been an invalid waiver of the defendant's Fifth Amendment rights because the police initiated the communications that led to the confession. The question of whether a valid Fifth Amendment waiver could also act as a Sixth Amendment waiver was

never specifically addressed although the impression to be gained from the decision is that it might well be. In United States v Bentley, 726 F2d 1124 (CA6-1984) the court there found that Edwards, supra, "emphasiz[ed] the need that [the defendant] be shown to have made a knowing and intelligent waiver before his responses become admissible." (1127, 1128).

In Tinsley v Purvis, 731 F2d 791 (CA11-1984), the Court recognized that "[t]he Supreme court has applied the same standard for gauging waiver for both Fifth and Sixth Amendment rights." That standard was the one set forth in Johnson v Zerbst, supra, and followed in Brown, supra. The court recognized that "[o]ther circuits ...have suggested 'higher standards'", (794) and noted:

> In the abstract we cannot give meaning to the components of waiver: the knowing and voluntary relinquishment of the right to counsel. We can, with exacting scrutiny, test petitioner's conduct against this standard. (794).

The Seventh Circuit in Robinson v Percy, 738 F2d 214 (CA7-1984) decided in the same vein as Tinsley, supra, that it would "decline to impose a rigid test for determining when the accused validly has waived his Sixth Amendment right to counsel", holding that, "whether the accused has waived his Sixth Amendment right depends on the individual circumstances of each case." (222). In Robinson, as in the instant case, the defendant had been repeatedly given his Miranda warnings and had repeatedly waived them prior to giving the incriminating statement. The totality of the circumstances evidenced a clear intent to waive his Sixth Amendment rights.

In United States v Karr, 742 F2d 493 (CA9-1984), the Ninth Circuit noted that the arrested, Miranda-warned defendant" was familiar with the procedures" and "seemed eager to waive his rights to an attorney and to aid

the investigation." (495). Karr did not assert that the statements were involuntary but only that he did not specifically waive any Sixth Amendment right. The Court found, following Tinsley, supra, that the waiver standard under the Fifth and Sixth Amendments was the same. (495). The Court distinguished the strict rule of waiver found by the Second Circuit (Mohabir, supra), with the decisions of the Fifth and Sixth Circuits finding waiver where only Miranda warnings had been given (Jordan, supra; Brown, supra; Woods, supra), that of the Seventh Circuit applying a case-by-case approach (Robinson, supra, Tinsley, supra), and the "intermediate positions" taken by the First, Fourth, and Eighth Circuits (Payton, supra; Clements, supra; Fields v Wyrick, 706 F2d 879 (CA8-1983). The court ultimately held that the provision of Miranda warnings would suffice to establish a Sixth as well as a Fifth Amendment waiver. United

States v Mandley, 502 F2d 1103 (CA9-1974), and Coughlan v United States, 391 F2d 371 (CA9-1968). (496). The Petitioner submits that these last cases represent the more reasonable and correct stance.

STATE AUTHORITIES

State cases have also diverged on this question. In State v Wyer, 320 SE2d 92 (1984), the West Virginia Supreme Court held that a Sixth Amendment waiver should be judged by "stricter standards" than a Fifth Amendment waiver, "we do not equate a general request for counsel at the initial appearance before the magistrate as foreclosing in all cases the right of police officials to initiate a further discussion with the defendant to determine if he is willing to waive his Sixth Amendment right to counsel for purposes of procuring a confession." (105). The Court required, in addition to the standard Miranda warnings, a written waiver of the Sixth

Amendment right and a showing that the defendant was aware that he was under arrest and was informed of the nature of the charge against him.

The Supreme Court of Iowa in State v Johnson, 318 NW2d 417 (1982) found that the mere inquiry by a defendant after having been advised of his Miranda rights by interrogating police officers as to whether he should have an attorney did not equate to a request or for an assertion of his right to counsel. (430). Waiver was to be addressed on a case-by-case basis, here, the valid Fifth Amendment waiver also waived his Sixth Amendment right. See also Fryer v State, 325 NW2d 400 (Iowa-1982).

California courts have held that a defendant cannot waive the Sixth Amendment right by merely having been given and waived Miranda rights. People v Superior Court of Fresno County, 145 Cal.App 581, 194 Cal.Rptr. 523

(1983). New York, based on its state constitution requires that where a Sixth Amendment right has attached, counsel must actually meet with the accused before any waiver will be valid. People v Cunningham, 49 NYS2d 203 (1980), and People v Hobson, 384 NYS2d 419 (1976). Oregon relied on its own state constitution and followed the lead of New York, State v Sparklin, 672 P2d 1182 (1983). Montana, however, in State v Norgaard, 653 P2d 483 (1982), Rhode Island in State v Burbine, 451 A2d 22 (1982), Louisiana in State v Huntley, 425 SO2d 766 (1983) and State v Harper, 430 SO2d 627 (1983), Georgia in White v State, 310 SE2d 540 (1983) and Ross v State, -- SE2d --, 36 CrL 2413 (1985), Maine in State v Carter, 412 A2d 56 (1980), Illinois in People v Owens, 464 NE2d 261 (1984), North Carolina in State v Bauguss, 311 SE2d 248 (1984), Virginia in Johnson v Commonwealth, 255 SE2d 525 (1979), Later App., 273 SE2d 784

(1981), Cert. Den., 454 US 920, 102 S.Ct. 422, 70 L Ed2d 231 (1981), Delaware in Flamer v State, 490 A2d 104 (1983), and Wisconsin in Jordan v State, 287 NW2d 509 (1980), have found that Miranda warnings are sufficient in and of themselves to establish a Sixth Amendment waiver in a particular case.

All of which brings us to the decision of the Michigan Supreme Court. As noted above, the Court found that both Fifth and Sixth Amendment rights had attached to JACKSON, that JACKSON'S request for appointed counsel at the arraignment on the warrant triggered his Sixth Amendment rights, and that at no point did he "specifically request counsel for any subsequent interrogation.... [he] requested appointed counsel because [he was] financially incapable of retaining an attorney and [he was] unwilling to represent [himself]." (Bladel, at 53). The Court noted:

> Defendants never invoked their Fifth Amendment right to counsel before or during their post-arraignment interrogations. Furthermore, defendants knowingly and voluntarily waived their Miranda rights prior to their statements. (Appendix to Pet. for Cert., page 56).

Even so, the Michigan Court held that as the Sixth Amendment right to counsel was "considerably broader than its Fifth Amendment counterpart" and as neither the Michigan nor the United States Supreme Court had ever "delineated specific procedural requirements for waiver of the Sixth Amendment right", it would decide if the valid and repeated waiver of the Fifth Amendment by JACKSON also served to waive his Sixth Amendment protections. The court held that a "higher standard" for waiver was required than merely providing Miranda warnings. The Court criticized the various federal and state courts that held Miranda waivers sufficient on the basis that those courts allegedly did not sufficiently distinguish between the various constitutional

differences between the protections of the Fifth and Sixth Amendments. The Michigan "higher standard" for review of Sixth Amendment waivers however, could only be met by applying the Fifth Amendment rule of Edwards, supra, "by analogy". The Court went on to note that while judges and lawyers "may understand" the differences between Fifth and Sixth Amendment rights, "the average person does not". (App. to Cert. Pet., page 76). The Court held that "The simple fact that defendant has requested an attorney indicates that he does not believe that he is sufficiently capable of dealing with his adversaries singlehandedly." (App. to Cert. Pet., page 77), and that he had made an "unequivocal request for counsel" at the arraignment on the warrant. (App. to Cert. Pet., page 86).

These conclusions are directly contradicted by JACKSON'S entire course of conduct from

the time of his arrest, through his attempts to mislead the police as to who the killer was, to his efforts to aid the police investigation by actively urging a co-defendant to confess so that the originator of the killing (the wife of the deceased) would not go free while the killers went to jail. JACKSON wanted to deal with the police directly. He was repeatedly advised of his Miranda rights and repeatedly waived them. He requested counsel at the arraignment on the warrant not to interfere with his on-going relationship with the police but solely to have appointed counsel at the examination and trial stages to attempt to work out a deal with the prosecutor. He simply and clearly never asserted, whether equivocally or unequivocally, any right to counsel during the interrogation process.

Further, the Michigan Court held that by interrogating JACKSON after he had been ar-

raigned on the warrant, the police "were attempting to strengthen their cases by conducting 'one last round' of interrogation before counsel arrived." (App. to Cert. Pet., page 85). This statement disregards the "undisputed" fact noted by Justice Boyle in dissent, that the post-arraignment statement "was a repetition of the verbal and written statement given on August 1 in which the defendant confessed that he was the shooter...". The opinion of the Court itself recognizes this fact. (App. to Cert. Pet., pages 95-96, 127). It must be noted that those earlier statements were taken prior to arraignment and after JACKSON had (as the Court repeatedly found) waived his Fifth Amendment rights.5

5: (Although the Court did in its opinion suppress the earlier two statements referred to by Justice Boyle due to a delay in arraignment, at the time the final statement

While cases relied on by the Michigan Court dealt with jurisdictions where a request for appointment of counsel at the arraignment would result in an appointment within "thirteen minutes" to "within the hour", that is not the situation that obtains in Michigan where counsel is appointed several days later. Brown, supra; Campbell, supra. (Joint Appendix, pages 24-26)

Although the Court noted that this was a major "murder for hire" case, it concluded that "[a]lthough the thoroughness with which the warrant request was prepared may be commendable...there was no need, for purposes of the arraignment, to determine whether Knight or defendant was telling the truth." The Court made this statement recognizing that

---

5 was taken the police could not have known that the two statements on August 1 would, some five years later, be ordered suppressed. Thus, it is illogical and incorrect to assert that the final statement was taken solely to seek a "last round" advantage.)

the police were, attempting to "determine whether he [JACKSON] was telling the truth." (App. to Cert. Pet., pages 97-99). The investigation was clearly not concluded and yet, under the rule set forth, it could not continue. As held in Wyrick, supra, "The rule is simply an unjustifiable restriction on reasonable police questioning." (219)

Did this defendant know and waive his right to the assistance of counsel? Absolutely. He was told by the police of that right and waived that right at least seven times as the Michigan Supreme Court specifically found. He was also advised of that right by the arraigning magistrate and, although requesting counsel for trial, never requested or invoked the assistance of counsel during his contacts with the police.

Was this repeated warning-waiver cycle sufficient to cover both the Fifth and Sixth Amendment protections which had attached to

this defendant? Again, absolutely. He knew his rights, he knew he wanted to cooperate with the police, and he did actively and repeatedly cooperate with the police. His entire course of conduct, the specific facts of this case, evidences a knowing, voluntary and intentional relinquishment of his right to counsel. Johnson v Zerbst, supra; North Carolina v Butler, 441 US 369, 99 S.Ct. 1755, 60 L Ed2d 286, 293 (1979); Jurek v Estelle, 623 F2d 929, 939 (CA5-1980); Estelle v Smith, supra at 374, fn 16.

CONCLUSION AND RELIEF

The Petitioner recognizes that the right to counsel, whether based on the Fifth or Sixth Amendment, is a right jealously to be guarded and protected. The Petitioner also recognizes however, that those protections were not designed to operate in a manner to erect an impervious shield around an accused, impenetrable by the police and impervious to

justice. These rights were not designed to provide a convenient escape hatch whenever a defendant has been so unlucky as to have been caught.

The ultimate aim of JACKSON in his state appeal was to obtain a rule preventing any police-defendant interrogation, pre- or post-arraignment, unless an attorney were physically present. As noted by Chief Justice Burger in his concurrence in Edwards, supra, at 388:

> The extraordinary protections afforded a person in custody suspected of criminal conduct are not without a valid basis, but, as with all 'good' things, they can be carried too far.

As noted in United States v Springer, 460 F2d 1344, 1348 fn 4 (CA7-1972):

> there can be no sound public policy requiring law enforcement and prosecutory agencies to affirmatively prevent or deter individuals from confessing that they have engaged in unlawful conduct.

In this case, the Michigan Supreme Court has however accomplished both of these non-

desired results. That court has not only adopted the "consistently... rejected...paternalistic rule protecting a defendant from his intelligent and voluntary decisions about his own criminal case" (Justice White concurring in Michigan v Mosley, 423 US 96, 96 S.Ct. 321, 46 L Ed2d 313 (1975), but has ruled in a manner that "transform[s] the Miranda safeguards into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests" (opinion of Justice Stewart, Michigan v Mosely, supra at 320.)

Traditional concepts of waiver should control the question of Fifth or Sixth Amendment waivers of the right to counsel. A totality of the circumstances analysis should be employed to determine whether such a waiver has in fact been made. The judicially created Miranda warnings, which contain an explicit

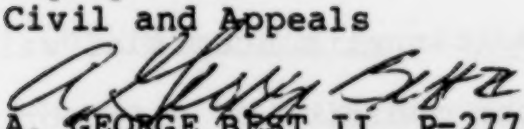
and express advisement of the right to counsel, when provided to an accused and when knowingly, voluntarily and intelligently waived by him, should be seen as effectuating a valid waiver of the Sixth Amendment right to counsel.

Wherefore, the Petitioner respectfully requests that this Honorable Court reverse the decision of the Michigan Supreme Court below.

Respectfully submitted,

JOHN D. O'HAIR
Prosecuting Attorney
County of Wayne

TIMOTHY A. BAUGHMAN
Deputy Chief
Civil and Appeals



A. GEORGE BEST II P-27749
Assistant Prosecuting Attorney
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5827

Dated: 1 July 1985

AGB/rh

No. 84-1531

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MICHIGAN,

Petitioner,

v.

ROBERT BERNARD JACKSON,

Respondent.

On Writ Of Certiorari To The Michigan Supreme Court

BRIEF FOR RESPONDENT

STATE APPELLATE DEFENDER OFFICE
JAMES R. NEUHARD
Defender

JAMES KROGSRUD
(Appointed by this Court)
Assistant Defender
Third Floor, North Tower
1200 Sixth Avenue
Detroit, Michigan 48226
(313) 256-2814
Counsel for Respondent Jackson

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Was Certiorari Improvidently Granted Because The Michigan Supreme Court's Judgment Reversing Respondent's Conviction Was Based On Adequate And Independent State Grounds, i.e., A Violation Of State Prompt Arraignment Statutes, Thus The Post-Arraignment Right To Counsel Issue Was Reached Only Because It Was Necessary For A Companion Case?

II. By Any Reasonable Standard, Can The State Establish That Mere *Miranda* Advice, Given Under The Coercive Circumstances Of This Case, Was Sufficient To Enable Respondent Jackson To Understandingly Waive His Rights To Counsel Guaranteed By The Fifth And Sixth Amendments To The United States Constitution?

TABLE OF CONTENTS

Table of Contents Continued

TABLE OF AUTHORITIES

Table of Authorities Continued

Table of Authorities Continued

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendments V and VI:

> "No person . . . shall be compelled in any criminal case to be a witness against himself. . ."
>
> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

COUNTER-STATEMENT OF CASE

During the early morning hours of July 12, 1979 Rothbe Elwood Perry was shot several times in his home in suburban Livonia, Michigan. Investigation at the scene showed that someone had entered the garage through an unlocked door and then pried open a door leading inside the house. On Saturday, July 28, 1979, following several weeks of investigation, Livonia police arrested the deceased's wife Mildred Perry, and Charles (Chare) Knight, a young black man from Detroit. (WHT 43-44).[1]

Ms. Perry promptly retained an attorney and was never successfully interrogated by police. (WHT 58). By Monday, July 30, 1979, Chare Knight, a young black man from Detroit, had confessed. Knight told police that he had been solicited by Ms. Perry to kill her husband. Knight, in turn, had contacted Respondent Robert Jackson. According to Knight, Jackson later told him that he and another man had broken into the Perry home and shot Mr. Perry. Following Knight's confession, Sgt. Ericson engaged police machinery to pick up Respondent Jackson. (WHT 45-49).

Detroit Police arrested Robert Jackson and a codefendant, Michael White, on the night of July 30, 1979. Interrogation

---

[1] "WHT denotes Walker Hearing Transcript. Prior to trial, a *Walker* [374 Mich. 331 (1965)] hearing was held to test the admissibility of the statements made by Robert Jackson and his codefendant Michael White. This hearing lasted seven (7) days. The prosecution presented eight police witnesses and both defendants testified.

sessions began that night and were continued by the Livonia Police over the next three days. (WHT 49-50, 97, 448). During that time the police obtained seven statements from Jackson. All seven statements were introduced at trial. According to the prosecution witnesses at the Walker Hearing, events occurred according to the following outline:

Thursday, July 12, 1979

Rothbe Perry killed

Saturday, July 28, 1979

Knight confessed, naming Respondent Robert Jackson as principal

Jackson and Michael White arrested by Detroit Police

Tuesday, July 31, 1979

2:00 p.m. Jackson, White transported from Detroit Police Headquarters to Livonia Police Headquarters

3:30 p.m. Jackson statement I (oral) to Sgt. Ericson, Sgt. Garrison

5:52 p.m. Jackson statement II (tape) to Sgt. Ericson, Sgt. Garrison, Sgt. Hoff

6:30 p.m. Sgt. Ericson informs codefendant Knight of Jackson's statement

8:48 p.m. Jackson statement III (tape 2) to Sgt. Ericson, Sgt. Garrison, Sgt. Hoff

11:00 p.m. Sgt. Ericson informs Jackson and Knight of need to take a polygraph exam to determine "who was being truthful"

Wednesday, August 1, 1979

9:30 a.m. Sgt. Ericson begins work on warrant request

10:00 a.m. Jackson polygraph exam

10:30 a.m. Jackson statement IV (oral) to polygrapher

11:00 a.m. Jackson statement V (oral) to Sgt. Hoff

12:30 p.m. Jackson statement VI (written) to Sgt. Hoff

1:30 p.m. Interrogation of codefendant Michael White by Sgt. Hoff, Sgt. Garrison, Lt. Campbell; Jackson present for part

4:30 p.m. Arraignment, Arrest Warrant issued, 16th District Court, Jackson, Perry, White, Knight present and request counsel

Thursday, August 2, 1979

10:24 a.m. Jackson statement VII (tape 3) to Sgt. Hoff, Sgt. Garrison

Testimony of Police Regarding Tuesday, July 31, 1979

The interrogation sessions at the Livonia Police Station were conducted by Sergeant Richard Ericson, Sergeant Shirley Garrison, and Sergeant William Hoff. All were veteran officers with more than 20 years of police experience. Robert Jackson, a 26 year old black man, had dropped out of his Detroit high school in the 11th grade.

Sgt. Ericson was the first prosecution witness to describe the interrogation sessions. Sgt. Ericson and Sgt. Garrison first picked up Robert Jackson and Michael White at Detroit Police Headquarters. Sgt. Ericson assumed they had already been questioned by Detroit Police (WHT 97). He testified that he gave Miranda advice in the garage, (WHT 51-52), and proceeded directly to Livonia, but there was no questioning en route. (WHT 98). Sgt. Ericson suggested "that they not make any comment at this time." (WHT 140).

Jackson and White were next taken into the booking room of the Livonia Police Station. Chare Knight was in the booking room when they arrived. (WHT 143-144). White was left in the booking area and Jackson was taken to the "conference" room in the basement of the police station. (WHT 51).

According to Sgt. Ericson, the first Livonia interrogation of Jackson began at about 3:00 p.m. and ended at about 4:20 p.m. (WHT 99, 115). They did not use a tape recorder but instead took notes. (WHT 113-114). Both Sgt. Ericson and Sgt. Gar-

rison were present when Sgt. Ericson again recited Miranda advice. (WHT 53). Both officers then alternately "explained various aspects of the case in an effort to demonstrate to him why he was now incarcerated." (WHT 55). They told him that Chare Knight had confessed to shooting Mr. Perry and had implicated him. Sgt. Ericson did not consider this questioning, instead "we were telling him. . . what we felt the case was against him. (WHT 100). Sgt. Ericson testified that Jackson never asked if he would be given leniency or a break, and only after arraignment did he tell Jackson that he would present the case to the prosecutor for a decision with one option being second degree murder. (WHT 128-130).

Sgt. Garrison, however, testified that at the first interrogation session Jackson raised the issue of a deal so that he wouldn't go to jail. Garrison felt Jackson "wanted to plead to anything if he could get a break too." (WHT 234-237). According to Sgt. Garrison, after telling him the difference in penalty between First and Second Degree Murder, they also told Jackson:

> "Later on you may obtain an attorney and whatever the attorney and the prosecutor works out between each other, then it is not in our hands, we can do nothing more than the First Degree." (J.A. 107).[2]

By about 3:30 p.m. on the 31st, Robert Jackson began "giving" a statment. (WHT 100). In this first statement Jackson, in the manner of facts police suggested, stated that Knight was the shooter and admitted accompanying Knight to the Perry home. (WHT 55-57). However, the police knew that Knight had accused Jackson of the shooting and had denied being present when the shooting occurred. (WHT 45-47, 61). Knight also testified to this version at Jackson's preliminary examination.

---

[2] "J.A." denotes Joint Appendix.

At 5:02 p.m. interrogation[3] resumed and Jackson signed a form waiving his rights under *Miranda*. (WHT 71). Sgt. Ericson testified that they began tape recording Jackson's second statement at 5:52 p.m. and finished at 6:27 p.m. (WHT 115-116). This first taped statement was "basically the same facts" given by Jackson in his first oral statement. (WHT 57-58).

Shortly after 6:30 p.m. on July 31, Sgt. Ericson confronted Chare Knight with Jackson's statement. Knight vehemently denied Jackson's version. (WHT 59). When the police later (8:48 p.m.—9:40 p.m.) returned to Jackson for a third (second tape recorded) statement, he gave "fundamentally the same" statement, again naming codefendant Knight as the shooter. (WHT 60). Then, at about 11 p.m. Sgt. Ericson "informed" both Jackson and Knight "that I was going to request that they submit to a polygraph examination . . . to assist me in determining who was being truthful." (WHT 62). Sgt. Ericson testified that he also told Jackson that he would be arraigned the next day and that afterwards the prosecutor and his court appointed attorney would "discuss the case". (J.A. 14).

Sgt. William Hoff testified that the Livonia Police had sufficient evidence to arrest Robert Jackson when they took custody of him from the Detroit Police on July 31st. Sgt. Hoff also testified that they "could have sought a warrant that [Tuesday] evening. However, . . . the Prosecutor's Office was closed." (J.A. 122-124). Hoff agreed that if the warrant had been issued on Wednesday morning, August 1st, Jackson could have been arraigned that morning, except the police needed to take him to a polygraph test. (J.A. 125).

Wednesday Morning, August 1, 1979

At about 9:30 a.m., Sgt. Ericson began work on the warrant request for Robert Jackson. (WHT 64-65). In the meantime,

---

[3] Sgt. William Hoff testified that he had notes of conversations or interviews of Jackson at 4:45 p.m., 6:37 p.m., 7:45 p.m. and 8:01 p.m. on July 31st. These conversations were not tape recorded. (WHT 337).

from 9 a.m. until about 12:30 p.m., Sgt. Hoff accompanied Jackson to the State Police Post for a polygraph exam. (WHT 343-344). Lt. Chester Romatowski, the polygraph operator, testified that he first gave Miranda advice. (WHT 373). At the conclusion of the examination, when Lt. Romatowski told Jackson that he was lying, Jackson admitted that he was the shooter and that codefendent Michael White had accompanied him to the Perry home. Lt. Romatowski told Jackson he should tell this to the Livonia police. (WHT 376). By about noon that day, Jackson also confessed orally and in writing to Sgt. Hoff. (WHT 308-309).

Wednesday Afternoon, August 1, 1979

At about 1:50 p.m. Sgt. Hoff and Sgt. Garrison began an interrogation session with codefendant Michael White. (WHT 312). Robert Jackson was brought into the interrogation room to help convince White that he should "cooperate" by making a statement. (IT 21-26).[4] Nevertheless, White repeatedly denied any involvement and was returned to the lock-up at about 3:30 p.m. However, by 4:00 p.m. just as he was being sent to District Court for arraignment, White asked to see Sgt. Hoff and admitted that he had been with Jackson when the shooting occurred. (WHT 313-314).

Sgt. Hoff and Sgt. Garrison used a variety of techniques to convince White to tell them where the murder gun was. As the tape recording reveals, Sgt. Hoff was the calm, soft-spoken and reasonable interrogator while Sgt. Garrison was the tough-talking, impatient interrogator. As they had with Jackson, they began by repeatedly telling White the evidence they had against him. (J.A. 150-155). At the same time they offered a deal, the police repeatedly threatened White with first degree

[4] "IT" denotes Interrogation Transcript for the Wednesday afternoon session involving primarily codefendant Michael White. A portion of this transcript is included in the Joint Appendix, pp. 144-164.

murder, high bond and even tearing up his house.[5] (J.A. 149-153; IT 20-22, 30-32, 34-35). These police officers advised White that if he asked for an attorney he would go to trial on first degree murder just like Ms. Perry. (J.A. 157-163). According to the police:

> "GARRISON: Now I think you need a brick to hit you against a wall to realize that your in serious trouble here and that the only way that you have any hope is by us. I don't know what your gonna think, now if you want an attorney, I'll tell you what an attorney is gonna tell ya, an attorney is gonna tell ya don't talk to police. I can tell you that right now. Don't talk to the police. But, the attorney doesn't go to jail, does he?
>
> "HOFF: You know what the attorney does when you say that, the attorney knows that that's going to get a trial, even if he's appointed he gets paid by how much trial days." (J.A. 157-158).

[5] The police threats are too numerous to list completely, however, a few examples include:

> "You're involved in a murder . . . you're gonna be going to court. The only thing that remains is whether or not you decide to tell us about it, cooperate, see what kind of deal we can get worked out for you." (J.A. 153).
>
> * * *
>
> ". . . the bond will be so high that you won't be able to get out. It doesn't have to be . . . . The only thing we don't know . . . whether we're gonna let you plead to something less, or . . . nail you all the way up murder in first degree." (J.A. 156).
>
> * * *
>
> "If you continue this position, there's only one way we can deal with you and that's go to trial. We're not gonna say, hey, we'll give Michael White the same deal that we gave Jackson and Charley." (IT 19).
>
> * * *
>
> "If you want to go up on murder one, life imprisonment, that's up to you. Now we'll work a deal and plead to something less and get two years, get out, that's your business. It's your choice." (IT 20).
>
> * * *
>
> "That guy who just knocked on the door? You know where he's going right now? . . . He's got a search warrant. He's gonna tear [your] house apart." (IT 24).

The police also placed time pressure on White, saying among other things, "the train is pulling out [of] the station", and '[t]omorrow is gonna be too late." (J.A. 160-163; IT 12, 18). Other techniques included suggesting White's stomach would relax if he talked[6], (J.A. 154), and arguing that his parents, teachers, ministers and judges would want him to cooperate and tell the truth. (IT 13-14, 31).

During their interrogation of codefendant Michael White, Sgt. Hoff and Sgt. Garrison repeatedly stated that they had already made a "deal" with Robert Jackson.

> GARRISON: We have almost sixty witnesses right now who will be testifying. And one of those witnesses is going to Bobby [Jackson]." (J.A. 155)
>
> * * *
>
> "HOFF: . . . Charlie, he's cooperating, we're gonna let him off with somethin' easy. And even the guy that did the shooting, Bobby Jackson." (J.A. 160).
>
> * * *
>
> "GARRISON: Bobey is not gonna take this whole load himself. Murder on is a lifetime and he knows that. He threw the damn dice out there, he's gambling. Charlie's gambling, that the Prosecutor's office, because of their sincere and honest testimony, that they'll be given some kind of consideration.
>
> "HOFF: We've already worked with the Prosecutor on that and come up with a few things . . . we've made a few deals there . . . Bobby is not going to be going for Murder One . . ." (IT 13).
>
> * * *
>
> "HOFF: And the police are gonna continue to treat him [Jackson] fairly. He's gonna, he's already got himself . . . he's gonna be charged on murder one. Initially he'll be on the warrant but that's gonna be worked out.

[6] Both Sgt. Garrison and Sgt. Hoff acknowledged that White had complained of stomach pains the previous day. (WHT 238, 325).

> "GARRISON: At the proper time he gets an attorney, a deal will be made at that time for his testimony that he will be allowed to plea to murder two. Then what's gonna happen is that he'll plead to murder two, he won't be sentenced until after the trial, after your trial is over with, and Mrs. Millies' trial is over with. After he testifies, the truthful and honest testimony, then the judge will sentence him. . . .
>
> "HOFF: He's gonna plead to a lessor and not be sentenced until the whole thing is over." (IT 18).
>
> * * *
>
> "HOFF: All we need is the testimony of Charlie Knight and Jackson and we've got a super case against her [Ms. Perry]. We've got a case against them but they're gonna plead ahead of time. . . . If you continue this position, there's only one way we can deal with you and that's go to trial. We're not gonna say, hey, we'll give Michael White the same deal that we gave Jackson and Charley." (IT 19).

After interrogating White for nearly an hour, Sgt. Hoff and Sgt. Garrison brought Robert Jackson into the interrogation room to persuade White to talk. (IT 21). Sgt. Hoff and Sgt. Garrison continued to outline their negotiations with Jackson:

> GARRISON: [H]e [White] not only knows that you're [Jackson] gonna be testifying . . . ah, but the other man [Knight] is goin to be testifying, because how they'll do it, they'll take a plea of guilty probably to second degree murder and then just hold your sentencing up for honest testimony.
>
> "HOFF: . . . you're gonna do some time, but you can come out with a little bit of time, as opposed to 15, 20 or 25 years on a first degree . . . You know, this guy [Jackson] didn't come right in and spill the whole thing, . . .
>
> "GARRISON: No" (IT 22).
>
> * * *
>
> "HOFF: You don't have to say nothing. We don't need that right now. But I'm hoping you'll, you'll go along and play ball like he [Jackson] is, like Charlie is. . . .
>
> "WHITE: Play ball? What kind of ball?

"HOFF: Well, trying to work yourself a deal, because your. . . .

"WHITE: What's that.

"HOFF: A plea to second degree, and maybe somethin' even less. I can't say anything less but at least a plea to second degree. Maybe even less. That's up to the prosecutor. How much time. . . .

"JACKSON: (inaudible) And how cooperative, you know, that we be. . . .

"HOFF: How about. . . .

"JACKSON: That's to jam her, that's what they want, I keep telling you. . . .

"HOFF: For testimony, we need testimony to get her good.

"JACKSON: This is what they're getting as far as we're concerned." (IT 24-25).

At the *Walker* hearing Sgt. Hoff testified that he had no knowledge of anyone on July 31st mentioning the possibility of anything less than First Degree Murder for Jackson. (WHT 341). Hoff testified that when Jackson raised the issue of a reduced plea on the return trip following the polygraph examination on August 1st, Hoff told him "it was up to the prosecutor, but that if he testified truthfully, that there may be something that could be worked out for him." (WHT 342). Later, on redirect examination, the prosecutor asked Sgt. Hoff to explain his comments during the White interrogation about a deal with Jackson. Hoff admitted telling White something "might" be worked out as with Jackson and Knight, but added that he told White it would be up to the prosecutor. Hoff denied he ever indicated that he had any authority to set bond. (J.A. 131-135). Sgt Hoff also testified that everything said during the interrogation of Michael White was "basically" true. (J.A. 129-130).

Sgt. Garrison testified that "nothing was ever said about the cooperation. Right from the start we are unable to do anything." (J.A. 112). According to Garrison, Jackson and White were merely told about the penalty for First Degree Murder. (J.A. 113). Garrison specifically denied telling White that the police could help them if he cooperated. (J.A. 117-121).

According to the transcript of the tape recording of the interrogation of Michael White, the subject of how cooperation with the police could help an accused was discussed many times:

"HOFF: I'll tell ya, the only thing we don't know what we're gonna do. We know that we're going to charge you with murder one. We know that your gonna get arraigned today. We know that the bond will probably be so high that you won't be able to get out. It doesn't have to be, but it's gonna be high. The only thing we don't know at this point is how we're gonna treat you in a couple of weeks down the line when we get down to the circuit court, whether we're gonna let you plead to something less, or whether we're gonna stick with our evidence and nail you all the way up murder in first degree." (J.A. 156).

* * *

"HOFF: You are a hardened criminal, if you're sittin' there denyin'. Listen, let's put yourself in the position of the judge, okay? Your a judge. You get a guy up before ya. . . . He's cooperative with the police he's straightened it out. Told his side of it. . . . The ones that get probation, or get the light sentences, are the ones that cooperate and show a little more. You know, after a man's found guilty or pleads guilty, there are a lot of things that happen after that. There's a lot of evaluations that are done, presentence evaluation reports. . . . Well, the police input into that report is very important. . . ., if the police can say something favorable about the guy, say, 'Hey, he did cooperate. . . .' When the judge reads that, it carries a lot of weight because policemen aren't noted for making favorable comments about too may people who are defendants . . ." (IT 14-15).

* * *

"HOFF: Let me tell you somethin' right now. You know, I can't go out on a limb and promise you somethin' that I

can't deliver. Do you understand that? The only one who can really promise you anything or can work somethin' out for you is the prosecutor. We've given you a little bit here. He can do more for you that we can. . . . All I can tell you is that I'll do everything I can to help you can out of this. . . . We'll do everything we can." (IT 27).

* * *

"HOFF: . . . everybody doesn't have to get the same sentence. You plead to the same thing he does. He can do more time than you. . . . They're gonna look at your, your background, remember I already told you about the evaluations? They're gonna look at that." (IT 29).

* * *

"GARRISON: . . . Now, I'll tell you what Charlie Knight, when he told us that he didn't go to the house. . . . We told him, hey second degree, blah, blah, blah just like we said here. But listen if we find out you're lying, the deal if off. The deal is off. O.K., that the same situation here with you." (IT 32).

* * *

"CAMPBELL: They [police] can say, $10,000 bond or no bond. They can say that. But they can't release you." (IT 39).

* * *

"CAMPBELL: Well, the prosecutor don't know but he [Sgt. Hoff] can promise you more than they can. O.K. In other words, here, when they go down for the warrant, they say to the prosecutor, 'this is want I want', O.K.? The prosecutor'd say, '- - - you! What are you going for Two on this guy for? We want one.' And they'll say, 'Hey, the man helpin' us, the man wasn't in the house.' Dig it? . . . He say, 'Well, that what you really want?' 'Yeah, that's what we want.' 'O.K., then your got it.' But if they walked in there and says, 'This guy here, this guy said this guy was here and we can't prove it one way or another. But, this man is going to testify that he was there. We can't prove one way, we can't even, he hasn't even said nothing'. Alls he's done is jammed us from the word go. And so I guess we're going to go One.' (IT 45-46)

At 4:30 p.m. Robert Jackson and codefendants White, Perry and Knight were arraigned at the 16th District Court in

Livonia. (J.A. 2-3). Mrs. Perry was represented by an attorney. (J.A. 3, 166). The magistrate read the charges and asked for a plea from the defendants. (J.A. 165-168). The magistrate gave no advice and simply recommended the appointment of counsel pursuant to Jackson's acknowledgment of his written affidavit requesting counsel. (J.A. 168).

The next morning, at 10:24 a.m., Thursday, August 2, 1979, Jackson made a tape recorded confession admitting that he shot Elwood Perry. (J.A. 31-79). Sgt. Hoff began this last session as follows:

"Q Alright now Robert over the last day and a half or so we've talked with you on prior occassions and we've advised you of your constitutional rights, is that correct?

"A Yes, it is.

"Q And at that time you indicated that you did understand your rights and you at that time elected to waive these rights and answer certain questions, is that correct?

"A Yes it is.

"Q Okay I'm going to once again go through your rights and ask if you do understand them now, I'll read them. You do have a right to remain silent, not make any statements or answers nor incriminate yourself in any manner whatsoever. Anything you say can and will be used against you in a court or courts of law for the offense of offenses concerning which any statement is made. Do you understand what I've read this far?

"A Yes I do.

"Q Okay continuing that you can hire a lawyer of your own choice to be present and advise you before and during any questioning and that if you are unable to hire a lawyer you can request and receive appointment of a lawyer by proper authority without cost or charge to you to be present and advise you before and during any questioning. Do you understand them thus far?

"A Yes I do.

"Q And second, or continuing that you can refuse to answer any questions or stop giving any statement any time you want to and that no law enforcement officer can prompt you as to what to say during this questioning nor write you a statement for you unless you choose for him to do so. Now do you understand these rights as I've read them?

"A Yes I do.

"Q Now Robert just for the record can you tell us a little about your educational background?

"A Sir I went to McKenzie High School in Detroit, I went to the 11th grade and I had some vocational training. I took a vocational course (inaudible) and basically that's

"Q Okay now you're aware of course that I'm a police officer and these officers are also police officers with the Livonia Police Department, is that right?

"A Yes sir.

"Q Now knowing and understanding your rights ah do you at this time wish to answer any questions that we might ask of you?

"A Yes I am." (J.A. 31-33).

Testimony of Robert Jackson

Respondent Robert Jackson also testified at the *Walker* hearing. Jackson stated that he was first arrested by Detroit Police on July 30th and questioned three or four times. (J.A. 96). The Livonia Police took him into custody at about 1:00 p.m. the next day. (WHT 439-440). According to Jackson, he was not advised of his constitutional rights until the first tape recorded statement was made. (J.A. 87-89).

Jackson testified that he did not answer the police questions right away. (J.A. 88). After the police had told him they had enought evidence to convict him on Murder One, they indicated that they really wanted Mrs. Perry. Jackson asked for an attorney, but Sgt. Ericson and Sgt. Garrison told him that an attorney could not help him at that time. They told him that if

he cooperated by going along with codefendant Knight he would be offered Second Degree Murder with consideration of something less. (J.A. 89-92).

Robert Jackson testified that the two police officers kept "questioning and badgering" him with words. Although he was not physically harmed, at one time while in the holding pen, Jackson heard someone hollering and screaming which caused him to fear that he would be beaten. (J.A. 92-93). Jackson testified that he made the first tape recorded statement because of the threats and promises of Sgt. Ericson and Sgt. Garrison. As before, they told him he was foolish not to cooperate in an effort to get Mrs. Perry. They also indicated that he could expect their help with the probation officer. (J.A. 97-98). Jackson did not ask for an attorney at this session because the usefulness of an attorney had been "explained away" by the police. (J.A. 101-102).

Robert Jackson's first contact with Sgt. Hoff was during the evening of July 31st when he was told that he had to take the polygraph if he was to get Second Degree with consideration of something lesser. (WHT 454-455). Sgt. Hoff repeated the discussion regarding his cooperation during their trip to the state police post the next morning. He stated that anything less than Second Degree would have to come from the prosecutor. (WHT 458). According to Jackson, even the prosecutor introduced himself just prior to arraignment and said he would be looking for Second Degree. (WHT 459-460).

Robert Jackson met Lt. Romatowski at the state police post on August 1st. (WHT 460). After the polygraph exam, Lt. Romatowski told him he had failed. Lt. Romatowski also told him "it is a shame, Mr. Jackson. . . by refusing. . . to make a statement that you are really hurting your own chances for Second Degree Murder. . . because you are going to go up for life if you don't. (WHT 461). A few minutes later, Jackson met with Sgt. Hoff. Again, Sgt. Hoff mentioned the possible deal. Jackson then told him that he was the shooter. (WHT 463).

Jackson testified that the day after his arraignment he agreed to make a third taped statement, this time to confirm himself as the shooter. (WHT 465). According to Jackson he had wanted to describe the deal on tape, (J.A. 31), but police had told him "to keep it in a mild nature." (WHT 466-467).

Defense counsel asked that the challenged statements be excluded on grounds that they were obtained as a result of (1) promises of leniency, (2) psychological coercion, (3) delay in arraignment for purposes of interrogation, and (4) a denial of the right to counsel. (WHT 650-687). The trial judge, seriatim, ruled each of Robert Jackson's statements admissible. The trial judge stated that Jackson was advised of his Miranda rights before each statement and that the police had made no improper promises or threats. Further, the trial judge did not believe that Jackson had requested counsel nor did he believe that the statements were the result of any illegal delay in arraignment. (J.A. 15-24, 136-137). However, the judge suppressed codefendant White's statements. The trial judge found that White had made requests for counsel which were ignored and, in addition, the police had improperly offered plea bargains. (WHT 715-716).

All of Robert Jackson's statements were used at trial. Chare Knight also testified for the prosecution in return for a 10-15 year sentence for second degree murder. Jackson was convicted of second degree murder and conspiracy to commit second degree murder on February 4, 1980. He was sentenced to life in prison.

On appeal as of right, Robert Jackson asserted that he had been denied his rights to due process and to counsel, guaranteed under the State and Federal Constitutions. Mich Const. 1963, art. 1, §§ 17, 20; U.S. Const. Ams. V, VI, XIV. The Michigan Court of Appeals affirmed his conviction for second degree murder, *People* v. *Robert Jackson*, 114 Mich. App. 649; 319 N.W.2d 613 (1982). The Court of Appeals upheld the trial court's findings of fact and agreed that the prosecution "established a knowledgeable and voluntary waiver of defendant's right to counsel." 114 Mich. App., at 656. Relying on *Blasingame* v. *Estelle*, 604 F.2d 893 (CA 5, 1979), the Court decided that "the circumstances surrounding defendant's request for counsel show it to have been unrelated to the Fifth Amendment right to confer with or have counsel present before answering any questions." 114 Mich. App., at 659. The Court did not reach the Sixth Amendment question.

The Michigan Supreme Court granted discretionary leave to appeal, 417 Mich. 885; 330 N.W.2d 846 (1983), and reversed. 421 Mich. 39; 365 N.W.2d 56 (1984). The Court ruled that Jackson had not invoked his Fifth Amendment right to counsel. The Court ruled that Jackson's post-polygraph statements were inadmissible because they were obtained while police delayed arraignment for purposes of interrogation. 421 Mich., at 69-74. The Court also ruled that the post-arraignment statement was inadmissible because Jackson was denied his right to counsel. The Court's basis for this ruling was summarized as follows:

> "We have merely extended the *Edwards/Paintman* rule *by analogy* to cases involving requests for counsel during arraignment, on the basis of our interpretation of both the Sixth Amendment right to counsel and its state constitutional counterpart embodied in Const. 1963, art. 1, § 20." 421 Mich., at 68.

SUMMARY OF ARGUMENT

I. Certiorari was improvidently granted because the Michigan Supreme Court reversed Respondent Jackson's conviction on adequate and independent state grounds. Specifically, that Court found that the police had unlawfully delayed Respondent's arraignment in violation of State statutes and the State Constitution.

II. Police interrogation is a critical stage of all criminal proceedings. Fairness demands that there be some time in the proceedings when counselless police interrogation ends. The rule advocated by the State allows for the possibility of police badgering at any time. Compare, *People* v. *Gonyea*, 421 Mich.

462; 365 N.W.2d 136 (1984) [police questioning in absence of counsel immediately after sentencing]. Arraignment is well-recognized as the formal initiation of adversary proceedings. The right to counsel is indispensable to the fair administration of our adversary system of criminal justice and formally attaches at arraignment. *Brewer* v. *Williams*, 430 U.S. 387, 398; 97 S.Ct. 1232; 51 L.Ed.2d 424 (1977). Even well-meaning police seeking to interrogate an accused cannot be relied upon to adequately inform the accused of the value of counsel at post-arraignment interrogation. The record in Respondent Jackson's case clearly establishes that under any reasonable standard, Respondent did not make an understanding waiver of the right to counsel. Without the assistance of counsel or formal inquiry by a neutral magistrate, the likelihood of an understanding waiver of the right to counsel is remote. Therefore, an accused's request for counsel at arraignment is at least an ambiguous request for counsel at police interrogation. Logically, it is a request for assistance of counsel against the organized prosecutorial forces of the State in all forms and forums. Fairness and the efficient administration of justice would be promoted by a bright-line rule prohibiting counselless interrogation after arraignment unless counsel is waived pursuant to consultation with counsel or judicial inquiry similar to that required in *Faretta* v. *California*, 422 U.S. 806 (1975) and *Von Moltke* v. *Gillies*, 332 U.S. 708, 723-724 (1948).

ARGUMENT

I. CERTIORARI WAS IMPROVIDENTLY GRANTED BECAUSE THE MICHIGAN SUPREME COURT'S JUDGMENT REVERSING RESPONDENT'S CONVICTION WAS BASED ON ADEQUATE AND INDEPENDENT STATE GROUNDS, I.E., A VIOLATION OF STATE PROMPT ARRAIGNMENT STATUTES, THUS THE POST-ARRAIGNMENT RIGHT TO COUNSEL ISSUE WAS REACHED ONLY BECAUSE IT WAS NECESSARY FOR A COMPA ION CASE.

At the very outset of the majority opinion of the Michigan Supreme Court in Respondent Robert Jackson's case, Justice Cavanagh wrote:

> "The common issue presented in these appeals is whether statements obtained after a defendant has requested appointment of counsel at arraignment are admissible pursuant to the principles enunciated in *Edwards* v. *Arizona*, 451 U.S. 477; 101 S.Ct. 1880; 68 L.Ed.2d 378 (1981), and *People* v. *Paintman*, 412 Mich. 518; 315 N.W.2d 418 (1982), cert. denied 456 U.S. 995; 102 S.Ct. 2280; 73 L.Ed.2d 1292 (1982)." *People* v. *Bladel and Jackson*, 421 Mich. 39, 44; 365 N.W.2d 56 (1984).

Clearly the Michigan Supreme Court had granted discretionary leave to appeal in these companion[7] cases because they were interested in the very same issue the United States Supreme Court now wishes to consider. However, after first deciding this common issue, the Michigan Supreme Court went on to consider issues raised solely by Respondent Robert Jackson. One of these separate issues was decided in favor of Jackson purely as a matter of State law. Moreover, this issue was dispositive of the case on appeal, independent of the issue this Court now seeks to decide.

The Michigan Supreme Court ruled that the last four of seven statements obtained by police should not have been admitted into evidence in Respondent's state trial. The first three statements, in which Jackson admitted being present when Knight shot Mr. Perry, were obtained on July 31, 1979, the second day of Jackson's incarceration. The next three statements, in which Jackson admitted shooting Perry, were obtained on August 1st after Jackson had taken a polygraph exam. The last statement (Jackson as shooter) was obtained on August 2nd after Jackson's arraignment. It is apparent that all of the last four statements were obtained as a result of police tactics in delaying arraignment. In Part IV of their opinion, the Michigan Supreme Court relied exclusively on State law to suppress Respondent's post-polygraph statements. The Court stated:

---

[7] The *Bladel* and *Jackson* cases are totally separate cases with nothing in common except a legal issue. The Bladel case arose from a transaction in Jackson County and the Jackson case originated in Wayne County.

"Although the police had sufficient probable cause to obtain a warrant for defendant Jackson's arrest as a result of codefendant Knight's statements, they did not do so. Defendant was 'arrested' on the murder charges on Tuesday, July 31, at 2 p.m. when he was turned over to the Livonia police. Since defendant was arrested for a felony without a warrant, the arresting officers were required to bring him before a magistrate for arraignment without unnecessary delay. MCL 764.13; MSA 28.871(1); MCL 764.26; MSA 28.885;[8] *People* v. *Mallory*, 421 Mich. 229, 238-239; 365 N.W.2d 673 (1984); *People* v. *White*[9], 392 Mich. 404, 424; 221 N.W.2d 357 (1974), *cert. den. sub. nom. Michigan* v. *White*, 420 U.S. 912; 95 S.Ct. 835; 42 L.Ed.2d 843 (1974)." 421 Mich., at 69.

* * *

[8] "A peace officer who has arrested a person for a felony offense without a warrant must without unnecessary delay, take the person arrested before the most convenient magistrate of the county in which the offense was committed, and must make before the magistrate a complaint, stating the offense for which the person was arrested." MCL 764.13; MSA 28.871(1).

"Every person charged with a felony shall, without unnecessary delay after his arrest, be taken before a magistrate or other judicial officer and, after being informed as to his rights, shall be given an opportunity publicly to make any statement and answer any questions regarding the charge that he may desire to answer." MCL 764.26; MSA 28.885.

[9] In 1960, based on State statutes, see fn. 8, and the State Constitutional guarantee of due process, then Mich. Const. 1908, art. 2, § 16; now Mich. Const. 1963, art. 1, § 17, Michigan became the first State to adopt an exclusionary principle similar to that announced in *McNabb* v. *United States*, 318 U.S. 332; 63 S.Ct. 608; 87 L.Ed. 819 (1942). *People* v. *Hamilton*, 359 Mich. 410, 411; 102 N.W.2d 738 (1960). Following the rationale of *McNabb*, the Michigan Supreme Court held inadmissible statements made during detention where arraignment had been delayed by police for the purpose of obtaining a confession. *People* v. *Hamilton*, *supra*. See also, *People* v. *Harper*, 365 Mich. 494, 502-503; 113 N.W.2d 808 (1962); *People* v. *Farmer*, 380 Mich. 198; 156 N.W.2d 504 (1968); *People* v. *White*, *supra*.

"The delay was used as a tool to extract the three post-polygraph statements. Sergeants Ericson, Hoff, and Garrison all testified that they asked defendant to submit to a polygraph so that they could determine whether he was telling the truth. Although they did not specifically instruct the examiner to obtain a statement, Sergeant Hoff testified that they had hoped to obtain another statement if defendant's original confession proved inaccurate. The police were obviously attempting to strengthen their case against all four defendants, particulary White, who had not yet confessed to any involvement. The three post-polygraph confessions therefore were not admissible." 421 Mich., at 73-74.

It is readily apparent that the Michigan Supreme Court's consideration of the post-arraignment *Edward's* type issue, see Parts I-III, was an *additional* ground which the Court needed to reach only for the companion case, *People* v. *Rudy Bladel*, Mich. S.Ct. No. 69749. All four of Respondent's post-polygraph confessions were obtained pursuant to an unreasonable delay in arraignment. It was during the unlawful delay that Respondent admitted he shot Mr. Perry. The final taped statement taken after arraignment merely confirmed what Jackson had already said during the unlawful delay. This is certainly fruit of the poisonous tree. *Wong Sun* v. *United States*, 371 U.S. 471; 83 S.Ct. 407; 9 L.Ed.2d 441 (1963). Moreover, it is difficult to imagine how the occurrence of an arraignment before the seventh and last confession would cure the unreasonable delay. In any case, if such arguments are to be made they must be on state grounds and in the state courts.

The Petitioner stated in the Petition for Writ of Certiorari:

"In their opinion, the Michigan Supreme Court held that the fourth, fifth, and sixth statements were obtained as a result of the violation of a state 'prompt-arraignment' statute. The Petitioner recognizes that this decision is not before this Honorable Court.

* * *

"*Even though a re-trial of this respondent must be held*, it is vital that this seventh statement be found to be admissi-

ble for the reason that in it, respondent admits that he was in fact the shooter, contrary to his earlier, admissible, statements. Thus, this petition presents a 'live' issue to this Honorable Court." (Petition for Writ, pp 12-13; emphasis added).

The record in Respondent's case includes more than 3800 pages of transcript. The hearing on Defendant's Motion to Suppress lasted seven (7) days and produced nearly 800 pages of transcript. It is incredulous that Petitioner now asks this Court to expend scarce federal judicial resources to review this case "even though a retrial of this respondent must be held". This Court should certainly find the *Bladel* case a more appropriate vehicle to resolve the issue of post-arraignment interogation.

This Court should dismiss the Writ of Certiorari as improvidently granted in Respondent Jackson's case because the decision of the Michigan Supreme Court to reverse his conviction was "alternatively based on bona fide separate, adequate, and independent grounds." *Michigan* v. *Long*, ____ U.S. ____; 103 S.Ct. 3469; 77 L.Ed.2d 1201, 1214 (1983). See also, *Lynch* v. *New York*, 293 U.S. 52; 55 S.Ct. 16; 79 L.Ed. 191 (1934); Seid, *Schizoid Federalism, Supreme Court Power and Inadequate Adequate State Ground Theory: Michigan* v. *Long*, 18 Creighton L.R. 1 (1984).

II. BY ANY REASONABLE STANDARD, THE STATE CANNOT ESTABLISH THAT MERE *MIRANDA* ADVICE, GIVEN UNDER THE COERCIVE CIRCUMSTANCES OF THIS CASE, WAS SUFFICIENT TO ENABLE RESPONDENT JACKSON TO UNDERSTANDINGLY WAIVE HIS RIGHTS TO COUNSEL GUARANTEED BY THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. Police Tactics In Robert Jackson's Case

Robert Jackson's case presents a unique and unusually candid inside view of police interrogation practices. In the 1960's,

the United States Supreme Court took the first serious steps to provide guidelines for police interrogation practices. *Escobedo* v. *Illinois*, 378 U.S. 478; 84 S.Ct. 1758; 12 L.Ed.2d 977 (1964), *Miranda* v. *Arizona*, 384 U.S. 436; 86 S.Ct. 1602; 16 L.Ed.2d 694 (1966). It is apparent that the police in Jackson's case found little pause in their efforts to circumvent the spirit of *Escobedo*, *Miranda*, and their progeny. Ordinarily these police practices remain undisclosed and only the barren waiver of rights and statements of the accused are highlighted. However, in this case, the police inexplicably made and retained a tape-recording of their contemporaneous interrogation of codefendant Michael White. A transcript of this tape-recording is a part of the record on appeal. In addition, there was an extensive record made at a seven (7) day pretrial suppression hearing.

Robert Jackson was first arrested by Detroit Police on Monday night, July 30, 1979, following the confession of Chare Knight accusing Jackson of the murder of Rothbe Elwood Perry. Knight's confession, and other evidence gathered by Livonia Police during nearly 3 weeks of investigation before Jackson's arrest, certainly provided sufficient evidence for "probable cause". Livonia Police had no lawful reason for not promptly taking Jackson before a magistrate.[10] (J.A. 122-123). Instead, they took him straight to their "conference" room in the basement of the police station. (WHT 50-51).

The police tactics in this case were designed to exert psychological pressure to obtain a confession to be used in court. First, Robert Jackson and codefendant Michael White were arrested, separated and incarcerated by Detroit Police. The next day (Tuesday) when transferred to Livonia, Jackson and White were told not to talk at all until they had arrived at the police station. (WHT 140). Presumably this prevented them from collaborating or, on the other hand, telling a story which they might feel compelled to stick to. By "chance" when they arrived at the booking area, there stood Chare Knight. (WHT

---

[10] See fn. 9; *supra*.

143-144). Jackson was then isolated and still prevented from talking until police could tell him about the mandatory life imprisonment he faced and Knight's confession claiming that Jackson shot Mr. Perry. (WHT 54-55). A review of the taped interrogation of Michael White shows that the police repeatedly stressed the hopeless situation these defendant's were in. See fn. 5, supra.

The police also made it clear to Jackson that his only hope was to "cooperate", waive his rights and make a statement, so that he could plead guilty to second degree murder, and take whatever sentence break the police could persuade the judge to give. Respondent Jackson asserted that he had requested an attorney during the first interrogation session but was told that an attorney would not help him. (J.A. 89-92). Who could blame an accused for failing to understand the value of counsel after being given advice such as that given by Sgts. Garrison and Hoff:

> "GARRISON: Now I think you need a brick to hit you against a wall to realize that your in serious trouble here and that the only way you have hope is by us. I don't know what your gonna think, now if you want an attorney, I'll tell you what an attorney is gonna tell ya, an attorney is gonna tell ya don't talk to police. I can tell you that right now. Don't talk to the police. But, the attorney doesn't go to jail, does he?
>
> "HOFF: You know what the attorney does when you say that, the attorney knows that that's going to get a trial, even if he's appointed he gets paid by how much trial days." (J.A. 157-158).

The Livonia Police wanted the courts to believe that no promises or inducements were made to obtain Robert Jackson's waiver of rights and his statements because they did not "guarantee" a deal.[11] Essentially, this was their position according to

[11] Michigan Courts have long held statements inadmissible if induced by a law enforcement official's promise of leniency. *People* v. *Conte*, 421 Mich. 704; 365 N.W.2d 648 (1984); *Flagg* v. *People*, 40 Mich. 706 (1879). As discussed at length in *Bram* v. *United States*, 168 U.S. 532, 542-561; 18 S.Ct. 183; 42 L.Ed. 568 (1897), the reliability of such an induced statement is suspect. Modern day psychologists support this conclusion. Zimbardo P.G., The Psychology of Police Confessions. Psychology Today, 1967, June 1(2), 17-27.

their sworn testimony at the *Walker* hearing. (J.A. 105-108). Sgt. Garrison testified that "nothing was ever said about the cooperation. Right from the start we are unable to do anything." (J.A. 269). Yet, the transcript of the tape recording[12] of the interrogation of codefendant Michael White clearly reveals that the police induced Respondent Jackson to waive his rights under the Fifth and Sixth Amendments, inter alia, by persuading him that his "cooperation" would enable him to plead to a lesser offense and recieve consideration for his testimony at the time of sentencing. Even an experienced lawyer might have been persuaded that the Livonia Police truly controlled the Wayne Country criminal justice system. See e.g., Counter-Statement of Case, *supra*.

In trying to persuade White to "cooperate", the police repeatedly stated they had already made a deal with Jackson:

> "We have almost sixty witnesses right now who will be testifying. And one of those witnesses is going to be Bobby [Jackson]."
>
> * * *
>
> ". . . Charlie, he's cooperating, we're gonna let him off with something' easy. And even the guy that did the shooting, Bobby Jackson." (J.A. 160). See also, Counter-Statement of Case, *supra*.

Even while Jackson accompanied White and the police in the interrogation room, the police stated:

> ". . . you're [Jackson] gonna be testifying . . . ah, but the other man [Knight] is going to be testifying, because how

[12] At the *Walker* hearing, Sgt. Hoff testified that everything said at this interrogation session was "basically" true. (J.A. 129-130). Sgt. Garrison testified that he did not realize, at the time of this interrogation, that everything was being tape recorded. (WHT 276).

> they'll do it, they'll take a plea of guilty probably to second degree murder and then just hold your testimony or hold your sentencing up for honest testimony. . . .You know, this guy [Jackson] didn't come right in and spill the whole thing, . . ." (IT 22). See also, Counter-Statement of Case, *supra*.

When they later testified in court, the police were obviously taking a hyper-technical view of their negotiations with Jackson and White. The police were especially careful to couch their testimony at the *Walker* hearing in language designed to ensure admissibility rather than to reveal their actual interrogation practices. See fn. 11, *supra*. It is apparent that each defendant, when it came to critical moments in their interrogation (and even the trial court), did not understand the language game[13] being played by these veteran police officers. But, the tape recording is quite clear. The police, despite their protestations that no "guarantees" were made, threatened to nail Robert Jackson "all the way up on One" unless he cooperated by giving a statement "because how they'll do it, they'll take a plea to second degree murder and then just hold your. . . sentencing up for honest testimony." [Sgt. Garrison speaking to Robert Jackson (IT 22)].

---

[13] In *United States* v. *Marshall*, 488 F.2d 1169, 1170-1171, fn. 1 (CA 9, 1973), the Court was concerned about the difficulty in understanding government agents:

> "The agents involved speak an almost impenetrable jargon. They do not get into their cars; they enter official government vehicles. They do not get out of or leave their cars, they exit them. They do not go somewhere; they proceed. They do not go to a particular place; they proceed to its vicinity. They do not watch or look; they surveille. They never see anything; they observe it. No one tells them anything; they are advised. A person does not tell them his name; he identifies himself. A person does not say something; he indicates. They do not listen to a telephone conversation; they monitor it. People telephoning to each other do not say 'hello;' they exchange greetings. An agent does not hand money to an informer to make a buy; he advances previously recorded official government funds. To an agent, a list of serial numbers does not list serial numbers, it depicts Federal Reserve Notes. An agent does not preface answers to simple and direct questions with 'to my knowledge.' They cannot describe a conversation by saying 'he said' and 'I said;' they speak in conclusions. Sometimes it takes the combined efforts of counsel and the judge to get them to state who said what. Under cross-examination, they seem unable to give a direct answer to a question; they either spout conclusions or do not understand. This often gives the prosecutor, under the guise of an objection, an opportunity to suggest an answer, which is then obligingly given."

Like Benjamin *[McNabb* v. *United States, supra]*, Robert Jackson made an incriminating oral statement after he was confronted with an accomplice's (Chare Knight) statement accusing him as the murderer. (J.A. 90-92). Although Jackson asserted that Knight was the shooter, his admission that he had accompanied Knight to the scene of the crime was surely enough to resolve any doubts, if there ever were any, about whether Jackson should be formally charged and arraigned. Nonetheless, the Livonia Police decided that more was required "to get the truth". Instead of taking Jackson before a magistrate, they held him to tape record his statement at 5:52 p.m. Then at 8:28 p.m., allegedly because the first recording was of "poor quality", the Livonia Police tape recorded the statement again. Each time Jackson asserted that Chare Knight was the shooter. (WHT 55-60).

Now with three confessions in hand, the Livonia Police still did not take Jackson before a magistrate. Instead, the next morning (Wednesday), like Andrew Mallory, [*Mallory* v. *United States*, 354 U.S. 499, 450-451 (1957)], the police had Jackson and Knight take polygraph tests. Sgt. Ericson testified that he told Jackson "he would have to submit to a polygraph test and pass it successfully before [he] totally believed his statement." (WHT 122). Presumably the winner of the polygraph sweepstakes would be given a "break" for cooperation in testifying against the loser. Chare Knight won. He subsequently testified against Jackson for a plea bargain to second degree murder and 10-15 years in prison. Robert Jackson lost. He subsequently admitted to the polygraph examiner and to Sgt. Hoff that he was the shooter. Finally, at 4:30 p.m., Wednesday, August 1, the Livonia Police finally took him

before a magistrate where he formally requested the assistance of counsel.

Extended incarceration was another tool the police used during their interrogation of Respondent Jackson. The length of delay Respondent's arraignment was not remarkable by itself. Jackson's first incriminating statement was made between 14 and 24 hours after his arrest by Detroit Police.[14] His last statement was made about 2-1/2 days after arrest. Benjamin McNabb's first incriminating statement was made just 5-6 hours after he was taken into custody. And Maurice Hamilton [*People* v. *Hamilton, supra*] lasted more than 3-1/2 days before he confessed. It was readily apparent, however, that the Livonia Police delayed arraignment for the unlawful purpose of extracting numerous incriminating statements to be used against Jackson at trial.[15]

---

[14] There was no dispute that Jackson was first arrested by Detroit Police on Monday night, July 30, 1979. However, the record does not indicate the exact time of arrest on that date. Jackson testified that he was questioned 3 or 4 times by Detroit Police. (J.A. 96). Sgt. Ericson assumed he had been arrested and questioned by Detroit Police during the night of July 30. (WHT 97).

[15] Sgt. William Hoff testified at the *Walker* hearing that the Livonia Police had sufficient evidence to arrest Jackson when they took custody of him from the Detroit Police on July 31st. Sgt. Hoff also testified that they "could have sought a warrant that evening. However, . . . the Prosecutor's Office was closed." (J.A. 122-123). Hoff also agreed that if the warrant had been issued on the morning of August 1st, Jackson could have been arraigned then, except the police needed to take him to a polygraph test. (J.A. 124-125). Ironically, the police found time to take Jackson to a polygrapher but couldn't fit an arraignment into their busy interrogation schedule.

The suggestions by Livonia Police that the delay in arraignment was justified by their need for approval from the prosecutor and the typing of a 36 page affidavit in support of a request for a warrant were transparent cover-up arguments. In 1960, the Michigan Supreme Court in *People* v. *Hamilton*, 359 Mich. 410, 417; 102 N.W.2d 738 (1960), recognized that "[m]agistrates of Michigan are, for purposes

B. The Right To Counsel For In-Custody Police Interrogation.

It is difficult to overstate the importance of counsel for an accused in police custody and facing expert interrogators. This Court has recognized the powerful psychological tactics available to police interrogators. See *United States* v. *Henry*, 447 U.S. 264, 273-274; 100 S.Ct. 2183; 65 L.Ed.2d 115 (1980). In *Miranda* v. *Arizona*, *supra*, at 445-448, Chief Justice Warren prefaced that benchmark decision with a discussion of the coercive nature and setting of in-custody interrogation. In declaring that the presence of counsel was a matter of right, the Court stated:

> "The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the Interrogation is indispensable to the protection of the Fifth Amendment

---

of said sections 13 and 26 [see fn. 8], on legal duty at all times; Sunday, holidays or no." In Wayne County there is an Assistant Prosecuting Attorney on call at all times. No one would doubt that, if police believed these procedures to be necessary to secure actual custody of Robert Jackson, they would have been streamlined to mere hours before he was taken into custody. But when custody had already been achieved and the accused's rights were at stake, police machinery moved at a decidely slower pace.

Due process does not define a strict number of hours within which prompt arraignment must occur. But the spirit of prompt arraignment is to avoid exactly what occurred here. Robert Jackson did not come to the police to volunteer a confession. He was arrested, jailed, pressured, wheedled and cajoled until he waived his rights to the satisfaction of the police and confessed numerous times. Others may have lasted longer but the timing of arraignment must not be dictated by the time it takes police to obtain a confession of their liking. This was not due process but police process. The Michigan Supreme Court recognized this and suppressed the statements obtained by the police after the polygraph exam. *People* v. *Bladel and Jackson*, 421 Mich., at 69-74.

privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights.

* * *

"The presence of counsel at the interrogation may serve several significant subsidiary functions as well. If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial." *Id.*, at 469-470.

In *United States* v. *Ash*, 413 U.S. 300; 306-313; 93 S.Ct. 2568; 37 L.Ed.2d 619 (1973), Justice Blackmun re-examined the history of the role of counsel in Anglo-American law.[16] Justice Blackmun was particularly concerned about the circumstances under which the right to counsel must be extended:

> ". . . extension of the right to counsel to events before trial has resulted from changing patterns of criminal procedure and investigation that have tended to generate pretrial events that might appropriately be considered to be parts of the trial itself. At these newly emerging and significant events, the accused was confronted, just as at trial, by the

[16] See also, *Powell* v. *Alabama*, 287 U.S. 45, 60-69; 53 S.Ct. 55; 77 L.Ed. 158 (1932); *Gideon* v. *Wainwright*, 372 U.S. 335; 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Massiah* v. *United States*, 377 U.S. 201; 84 S.Ct. 1199; 12 L.Ed.2d 246 (1964); *Coleman* v. *Alabama*, 399 U.S. 1; 90 S.Ct. 1999; 26 L.Ed.2d 387 (1970); *Brewer* v. *Williams*, 430 U.S. 387; 97 S.Ct. 1232; 51 L.Ed.2d 424 (1977); *Fare* v. *Michael C.*, 442 U.S. 707; 99 S.Ct. 2560; 61 L.Ed.2d 197 (1979); *Estelle* v. *Smith*, 451 U.S. 454; 101 S.Ct. 1866; 68 L.Ed.2d 359 (1981).

> precedural system, or by his expert adversary, or by both. In *Wade [United States* v, 388 U.S. 218; 87 S.Ct. 1926; 18 L.Ed.2d 1149 (1967)], the Court explained the process of expanding the counsel guarantee to these confrontations:
>
> > 'When the Bill of Rights was adopted, there were no organized police forces as we know them today. The accused confronted the prosecutor and the witnesses against him, and the evidence was marshalled, largely at the trial itself. In contrast, today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply 'critical' stages of the proceedings.' 38 U.S., at 224 (footnote omitted)." 413 U.S., at 310-311.

There should be little doubt that police interrogation is a more critical stage than the corporal line-up which was the subject of *Wade*. A confession not only establishes identity but also frequently determines every issue of a criminal trial. Although it is reasonable to assume that an accused will not often admit to some involvement in a crime when there was none, the determination of the accused's degree of involvement is often a more critical issue. It is here that the skills of counsel are required. Without counsel to insure accuracy, the jury trial frequently becomes a formality where the police redition of the accused's confession is practically unrebuttable.

Counsel is especially important when, as now, the criminal justice system is under extreme pressure. The caseloads of judges and prosecutors are increasing rapidly. These public servants, no matter how noble, are less able to perform their traditional and personal duties to insure that justice is done for each individual who stands accused. See *Burger* v. *United States*, 295 U.S. 78, 88; 55 S.Ct. 629; 79 L.Ed.2d 1314 (1935). In *Ash*, *supra*, at 308-309, the Court recognized the need for counsel to minimize the imbalance resulting from the creation of a professional prosecutor in the 18th century. As the criminal

justice system becomes increasingly adversarial, the individual must rely more heavily on defense counsel to insure fairness through a balance of power.[17]

It is well settled that each time the Livonia Police interrogated Respondent Robert Jackson while in custody, the 5th and 14th Amendments to the United States Constitutional guaranteed him the right to have counsel present.[18] Under some circumstances, a Sixth Amendment right to counsel has also been extended when, as in Respondent' case, police investigation has focused on the accused as a suspect rather than a

---

[17] In *Brewer* v. *Williams*, *supra*, at 398, Justice Stewart wrote:

"This right [to counsel], guaranteed by the Sixth and Fourteenth Amendments, is indispensable to the fair administration of our adversary system of criminal justice. Its vital need at the pretrial stage has perhaps nowhere been more succinctly explained than in Mr. Justice Sutherland's memorable words for the Court 44 years ago in *Powell* v. *Alabama*, 287 U.S. 45, 57:

'[D]uring perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.'"

[18] In *Edwards* v. *Arizona*, 451 U.S. 477, 481-482; 101 S.Ct. 1880; 68 L.Ed.2d 378 (1981), the Court was Clear and unequivocal in affirming this right:

"In *Miranda* v. *Arizona*, *supra*, the Court determined that the Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination required that custodial interrogation be preceded by advice to the putative defendant that he has the right to remain silent and also the right to the presence of an attorney. *Id.*, 384 U.S., at 479. The Court also indicated the procedures to be followed subsequent to the warnings. If the accused indicates that he wishes to remain silent, 'the interrogation must cease.' If he requests counsel, 'the interrogation must cease until an attorney is present.' 384 U.S., at 474.

"Miranda thus declared that an accused has a Fifth and Fourteenth Amendment right to have counsel present during custodial interrogation."

general investigation.[19] Finally, there is little question that when interrogated after arraignment, the 6th Amendment guaranteed Jackson the right to the presence of counsel.[20] The

---

[19] In *Escobedo* v. *Illinois*, 378 U.S. 478; 84 S.Ct. 1758; 12 L.Ed.2d 977 (1964), a police investigation of murder had focused on Danny Escobedo. Escobedo, like Respondent Jackson "had become the accused, and the purpose of the interrogation was to 'get him' to confess despite his constitutional right not to do so." Id., 485. The police took Escobedo into custody for interrogation and refused to honor his request for counsel at the interrogation. Justice Goldberg, writing for the majority, stated:

"What happened at this interrogation could certainly 'affect the whole trial,' since rights 'may be as irretrievably lost, if not then and there asserted, as they are when an accused represented by counsel waives a right for strategic purposes.' It would exalt form over substance to make the right to counsel, under these circumstances, depend on whether at the time of the interrogation, the authorities had secured a formal indictment. Petitioner had, for all practical purposes, already been charged with murder." [citations omitted] 378 U.S., at 486.

[20] In their opinion below, *People* v. *Bladel*, 421 Mich. 39, 51-52; 365 N.W.2d 56 (1984), the Michigan Supreme Court succinctly recounted the authorities establishing this right:

"The Sixth Amendment guarantees that '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.' However, this right to counsel attaches only at or after the initiation of adversary judicial proceedings against the accused by way of a formal charge, preliminary hearing, indictment, information, or arraignment. *United States* v. *Gouveia*, ____ U.S. ____, ____; 104 S.Ct. 2292; 81 L.ED.2d 146, 153-154 (1984); *Kirby* [v. *Illinois*, 406 U.S. 682; 92 S.Ct. 1877; 32 L.Ed.2d 411 (1972)], *supra*, 406 U.S. 688-689. The accused is entitled to counsel not only at trial, but at all 'critical stages' of the prosecution, i.e., those stages 'where counsel's absence might derogate from the accused's right to a fair trial.' *United States* v. *Wade*, 388 U.S. 218, 226-227; 87 S.Ct. 1926; 18 L.Ed.2d 1149 (1967). Regardless of whether the accused is in custody or subjected to formal interrogation, the Sixth Amendment right to counsel exists whenever the police attempt to elicit incriminating statements. *Henry [United States* v. 447 U.S. 264; 100 S.Ct. 2183; 65 L.Ed.2d 115 (1980)], *supra*, 447 U.S. 271-273. See also *Brewer* v.

serious questions in this case are whether Respondent Jackson waived these rights.

C. Waiver Of Constitutional Right To Counsel Generally.

In 1938, the Supreme Court adopted a general definition of waiver in a case involving the constitutional right to counsel. *Johnson* v. *Zerbst*, 304 U.S. 458, 464; 58 S.Ct. 1019; 82 L.Ed. 1461 (1938):[21]

> "It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.' *A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.* The determination of whether there has been an intelligent waiver of the right to Counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." (footnotes omitted, emphasis added).

Application of this waiver standard is not always a simple matter. In *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 243-244; 93 S.Ct. 2041; 36 L.Ed.2d 854 (1973), Justice Stewart wrote:

> "To be true to *Johnson* and is progeny, there must be examination into the knowing and understanding nature of the waiver, an examination that was designed for a trial judge in the structured atmosphere of a courtroom. As the Court expressed it in *Johnson:*

Williams, 430 U.S. 387; 97 S.Ct. 1232; 51 L.Ed.2d 424 (1977); *Massiah* v. *United States*, 377 U.S. 201; 84 S.Ct. 1199; 12 L.Ed.2d 246 (1964)."

[21] This same standard is now applied where the right to counsel is quaranteed by the 5th *or* 6th Amendments. *Edwards* v. *Arizona*, 451 U.S. 477, 482; 101 S.Ct. 1880; 68 L.Ed.2d 378 (1981). See *Faretta* v. *California*, 422 U.S. 806, 835; 95 S.Ct. 2525; 45 L.Ed.2d 562 (1975); *North Carolina* v. *Butler*, 441 U.S. 369, 374-375; 99 S.Ct. 1755; 60 L.Ed.2d 286 (1979); *Brewer* v. *Williams*, *430 U.S. 387, 404; 97 S.Ct. 1232; 51 L.Ed.2d 424 (1977); Fare* v. *Michael C.*, 442 U.S. 707, 724-725; 99 S.Ct. 2560; 61 L.Ed.2d 197 (1979).

> 'The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.' 304 U.S, at 465."[22]

It is apparent that the Court has not felt compelled to remain "true" to *Johnson* and its progeny in cases involving in-custody *pre*-arraignment interrogation. Although adhering to the *Johnson* definition, the police are generally entrusted to determine waiver in the first instance and courts try to reconstruct whether the waiver was intelligent under the totality of the circumstances. *Solem* v. *Stumes*, ___ U.S. ___; 104 S.Ct. 1338; 79 L.Ed.2d 579, 589-590 (1984); *North Carolina* v. *Butler*, 441 U.S. 369, 374-375; 99 S.Ct. 1755; 60 L.Ed.2d 286 (1979). The in-court examination of the accused has been required where an accused seeks to waive counsel at trial, *Faretta* v.

---

[22] The Court was even more explicit in *Von Moltke* v. *Gillies*, 332 U.S. 708, 723-724; 68 S.Ct. 316; 92 L.Ed. 309 (1948):

> "To discharge this duty [of assuring the intelligent nature of the waiver] properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. *The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility.* To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered." (emphasis added).

California, 422 U.S. 806; 95 S.Ct. 2525; 45 L.Ed.2d 562 (1975). Courts may be reluctant to make such procedure a requirement for pre-arraignment interrogation presumably because of the practical difficulties which might frustrate police and because interrogation at the pre-arraignment stage is frequently investigatory rather than solely accusatory. Cf. *Schneckloth* v. *Bustamonte*, *supra*, at 245. Once formal criminal proceedings have begun, however, the police interrogate the accused presumably to bolster the State's case and the accused must be brought before a magistrate for arraignment anyway. The circumstances have changed and the more careful judicial examination is both fair and practical.

D. The Prosecution's Burden To Prove A Post-Arraignment Waiver Of Counsel During Police Interrogation Is Substantially Greater Than A Pre-Arraignment Waiver Because An Understanding Waiver At This Stage Is Extremely Unlikely.

It is fundamentally unfair to hold that a precious right is waived under circumstances where an individual is unlikely to have understood the importance of that right. See e.g., fn. 22 (*VonMoltke* v. *Gillies*). There is not one lawyer in this country who would have the temerity to say that an accused should talk to the police without counsel to advise him.[23] The plain likelihood is that the accused has little or no comprehension of what

[23] Consider, for example, a child of 10 who seeks to "waive" the apparent drugery of public school. Few would disagree that the child cannot waive the precious right to education. Yet when the child reaches age 16 or achieves 8th grade, an understanding "waiver" may be made. On the other hand, if a patient had a right to a heart transplant, there is probably no age at which such a right could be intelligently waived *or* invoked without examination by a heart surgeon and a thorough discussion with the patient. And yet, where the constitution provides a right which every legal expert would summarily invoke for a client without examination, how can courts be willing to assume an "understanding" waiver on the basis of police testimony that they advised the accused pursuant to *Miranda?*

he is doing if he waives the right to counsel after the State has already formally charged him with a felony.[24] Why then should courts be easily persuaded that counsel may be waived so long as police inform the accused, pursuant to Miranda, that he/she has a right to counsel?

In Robert Jackson's case, the police initiated the interrogation session which followed Jackson's request for counsel at arraignment. The Michigan Court of Appeals attempted to distinguish the *Edwards* case from the case at bar because Jackson requested counsel at his arraignment rather than during an interrogation session. *People* v. *Jackson*, 114 Mich. App. 649, 658-659 (1982). The Michigan Court of Appeals quoted from *Blasingame* v. *Estelle*, 604 F.2d 893, 895-896 (CA. 5, 1979) [a pre-*Edwards* case]:

> "[S]ome defendants may well wish to have an attorney to represent them in legal proceedings, yet wish to assist the investigation by talking to an investigating officer without an attorney present. 'While the suspect has an absolute right to terminate stationhouse interrogation, he also has the prerogative to then and there answer questions, if that be his choice.' *Nash* [v. *Estelle*, 597 F.2d 513, 517 (CA. 5, 1979)]. To hold that a request for appointment of an attorney at arraignment would bar an investigating officer from later finding out if defendant wishes to exercise this

[24] As Judge Knapp pointed out in *United States* v. *Satterfield*, 417 F.Supp. 293, 296 (SD. NY.), aff'd., 558 F.2d 655 (CA. 2, 1976):

> "Prior to indictment—before the prosecution has taken shape—there may be reasons why a suspect might rationally wish to deal with agents without the intervention of counsel. By getting in their good graces and being useful to the government he might be able altogether to avoid indictment or any legal entaglement. No such opportunity is open to him after a grand jury has spoken. At that point he cannot make any arrangement with agents or prosecutor that is not subject to ultimate approval by the court, and counsel is obviously important to advise him on what terms such approval is likely to be forthcoming and how best to obtain it."

See also, *United States* v. *Clements*, 713 F.2d 1030, 1034 (CA. 4, 1983).

prerogative would transform the *Miranda* safeguards, among which is the right to obtain appointed counsel, 'into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests.' *Michigan* v. *Mosley*, 423 U.S. 96, 102; 96 S.Ct. 321, 326; 41 L.Ed.2d 313 (1975)."

The suggestion that appointed counsel is an "irrational obstacle" and will "deprive suspects of an opportunity to make informed and intelligent assessments" totally ignores the fact that after arraignment, police interrogation has become a prosecutorial activity designed to convict not to exculpate. Ironically, the Livonia Police also described counsel's role as an irrational obstacle when they advised "the only way you have any hope is by us . . . the attorney doesn't go to jail, does he?" (J.A. 157-158). It is ludicrous to suggest that Robert Jackson, or any other person formally charged with first-degree murder, requests counsel at arraignment solely because he wants help in the courthouse but not in the stationhouse.

Logically, it cannot be disputed that the right to counsel becomes more important after the State has formally decided to charge an accused with a serious crime. Since the circumstances the accused finds himself in are always more accusatory after arraignment than before, the burden on the prosecution must increase. Those authorities holding that a greater burden exists vary as to what extend the burden increases.[25] However,

---

[25] See *United States* v. *Mohabir*, 624 F.2d 1140 (CA. 2, 1980) [judicial officer must explain content and significance of right to counsel]; *United States* v. *Clements*, 713 F.2d 1030 (CA. 4, 1983) [mere *Miranda* advice insufficient, accused must at a minimum also be informed of indictment]; *State* v. *Wyer*, 320 S.E.2d 92 (W.Va, 1984) [defendant must execute a written waiver after being informed of his arrest, the nature of the charges against him, and his *Miranda rights] People* v. *Bladel and Jackson*, 421 Mich. 39, 65-66; 365 N.W.2d 56 (1984) [at a minimum, *Edwards*-type rule applies]; *United States* v. *Durham*, 475 F.2d 208, 210-211 (CA. 7, 1973) [Chief Judge Swygert would adopt per se exclusionary rule].

in any case an understanding waiver of the precious right to counsel for post-arraignment interrogation should require more than mere *Miranda* advice.

E. Where Respondent Jackson Gave Seemingly Inconsistent Responses To Questions Whether He Wanted Counsel At Post-Arraignment Police Interrogation, There Was Not An Effective Waiver Of His Fifth Amendment Right To Counsel Under The Totality Of The Circumstances.

Robert Jackson testified that he asked for counsel at the start of the first pre-arraignment interrogation session in the Livonia Police Station on July 31st, 1979. He testified that when later asked whether he wanted an attorney, pursuant to the incantations required by *Miranda* v. *Arizona*, *supra*, he declined because the Livonia Police had explained that an attorney would not help, rather, only his personal cooperation could lead to a possible deal. (WHT 444-445). Jackson's testimony was strongly corroborated by a tape recording of similar outrageous police tactics during the interrogation of codefendant Michael White. See Part A, *supra*. The Livonia Police denied all improper conduct. The trial judge decided only that Jackson had not requested counsel. (J.A. 22).

It was undisputed, however, that Jackson requested the appointment of counsel when he was arraigned in District Court on August 1, 1979, and the police knew it. (J.A. 168; WHT 130). On the day after he had been arraigned and returned to the Livonia Jail, Jackson was again interrogated. Sgt. Ericson testified they wanted another taped statement from Jackson because he learned "that Bobby Jackson had now changed his statement." (J.A. 4). Sgt. Hoff began the post-arraignment interrogation by reminding Respondent that he had waived his rights in the past. There was no discussion or recognition of his recent request for counsel. As far as the record shows, there was nothing done beyond advising of *Miranda* rights. (J.A. 31-33).

All of the courts below held that Respondent Jackson either did not invoke his 5th Amendment right to counsel or knowing-

ly and voluntarily waived the right to counsel by failing to request counsel when advised by police pursuant to *Miranda*, *supra*. See *People* v. *Bladel*, *supra*, at 53. However, the lower courts failed to consider that Jackson's unequivocal request for counsel at arraignment should be construed as at least an ambiguous request for the presence of counsel at interrogation.

In *Smith* v. *Illinois*, 469 U.S. ____; 105 S.Ct. 490; 83 L.Ed.2d 488 (1984), the Court considered a case where the accused was being questioned by police shortly after arrest but before arraignment. He first stated that he wanted counsel present and then promptly agreed to talk to police alone. The Court held that since the accused first request was unequivocal police should not have continued questioning him. The Court in *Smith*, *supra*, at ____; 83 L.Ed.2d, at 494 noted an issue which was unnecessary to reach:

> "On occasion, an accused's asserted request for counsel may be ambiguous or equivocal. As the majority and dissenting opinions below noted, courts have developed conflicting standards for determining the consequences of such ambiguities.[3] We need not resolve this conflict in the instant case, ..." (citations omitted).

[3]Some courts have held that all questioning must cease upon any request for or reference to counsel, however equivocal or ambiguous. See, e.g., *People* v. *Superior Court*, 15 Cal.3d 729, 735-736, 542 P.2d 1390, 1394-1395 (1975), cert denied, 429 U.S. 816, 50 L.Ed.2d 76, 97 S.Ct. 58 (1976); *Ochoa* v. *State*, 573 S.W.2d 796, 800-801 (Tex. Crim. App. 1978). Others have attempted to define a threshold standard of clarity for such requests, and have held that requests falling below this threshold do not trigger the right to counsel. See, e.g., *People* v. *Krueger*, 82 Ill.2d 305, 311, 412 N.E.2d 537, 540 (1980) ('[A]n assertion of the right to counsel need not be explicit, unequivocal, or made with unmistakable clarity,' but not 'every reference to an attorney, no matter how vague, indecisive or ambiguous, should constitute an invocation of the right to counsel'), cert denied, 451 U.S. 1019, 69 L.Ed.2d 390, 101 S.Ct. 3009 (1981). Still others have adopted a third approach, holding that when an accused makes an equivocal statement that 'arguably' can be construed as a request for counsel, all interrogation must immediately cease except

> for narrow questions designed to 'clarify' the earlier statement and the accused's desires respecting counsel. See, e.g., *Thompson* v. *Wainwright*, 601 F.2d 768, 771-772 (CA. 5, 1979); *State* v. *Moulds*, 105 Idaho 880, 888, 673 P.2d 1074, 1082 (App. 1983).

Under any of the above noted standards, the post-arraignment interrogation of Robert Jackson violated his 5th Amendment right to counsel. It was clear that Jackson recognized he needed counsel to help him in the courts and with his expected adversary, the prosecutor. It should have been assumed that his direct request for help with formal proceedings was no less a request for help against equally expert adversaries, the police, at a stage which counsel would have instantly recognized as the most critical stage of all. The Livonia Police never discussed Respondent's request for counsel. At the very least, some steps should have been taken beyond *Miranda* advice to insure a knowing (understanding) waiver.

F. The Police Interrogation Practices In Robert Jackson's Case Demonstrate That An Accused's Post-Arraignment Constitutional Rights Should Be Protected By A Prophylactic Rule.

This Court should hold that a post-arraignment waiver of counsel is not valid unless done after consultation with counsel or after proper judicial inquiry pursuant to *Faretta* v. *California*, 422 U.S. 806; 95 S.Ct. 2525; 45 L.Ed.2d 562 (1975). It is unrealistic to think that zealous police officers "engaged in the often competitive enterprise of ferreting out crime,"[26] will

---

[26] The need for preemptive judicial intervention to guarantee effective constitutional rights was recognized by Justice Jackson in *Johnson* v. *United States*, 333 U.S. 10, 13-14; 68 S.Ct. 367; 92 L.Ed. 436 (1948).

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption

fairly inform an accused of the value of his constitutional rights to counsel after the State has formally charged him with a serious crime. What occurs in the "conference" rooms of police stations rarely comes to light in the courtrooms of our criminal justice system. Police are under intense pressure to solve the burgeoning "problem" of crime which has perplexed the leaders of our country for decades. The news media daily bombard us with the horrors of crimes, many of which go unsolved. Yet, our government, without effectively attacking the roots of crime, asks the police to operate with inadequate resources and salaries. Well-meaning police, even some judges under such pressures dissemble, embellish and, sometimes, lie to ensure conviction of an accused they believed to be guilty of a serious crime.

It is important to remember that this case involves post-arraignment[27] interrogation. "Only in an atypical case . . .

---

that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." (Footnotes omitted.)

[27] In *Kirby* v. *Illinois*, 406 U.S. 682, 689; 92 S.Ct. 1877; 32 L.Ed.2d 411 (1972), Justice Stewart wrote:

"The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law."

does police interrogation occur after judicial proceedings are initiated." Grano, *Rhode Island* v. *Innis: A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 Amer. Crim. L.R. 1, 15 (1979). However, when post-arraignment interrogation does occur, it must be assumed that the police are seeking to strengthen the State's case for trial. Professor Kamisar fairly stated the circumstances as follows:

"Some people find it helpful to say that at this point there is a 'declaration of war' between the government and the defendant. The adverse positions of the government and the defendant have 'solidified.' The parties, as the Chief Justice put it in *Henry*, are now 'arms length adversaries.' 447 U.S., at 275. At this point, hopefully, the government has built its case. But if it has not, it cannot expect to elicit any more information from the defendant. It is too late. From this point on, the defendant is entitled to counsel and the agents of government may proceed against him only through his counsel." Kamisar, *Police Interrogation and Confessions* in Choper, Kamisar and Tribe, The Supreme Court: Trends and Developments, 1979-80, at p. 98 (1981).

It is unrealistic, indeed, fundamentally unfair to permit police interrogation to continue after arraignment with the accused's only protection being a pretrial hearing where the police are pitted against the accused in a swearing contest. The rich have an effective protection, an attorney who will come at their calling to advise them whether to speak. Unless the right to counsel is effectively guaranteed at arraignment by a prophylactic rule, the poor must rely on *Miranda* advice given by the police. The interrogation of Michael White graphically demonstrates the "*Miranda* advice" is hardly worth the paper its printed on when the formal reading of rights is followed by "police advice" such as that given by Sgt. Garrison and Sgt. Hoff:

"Now I think you need a brick to hit you against a wall to realize that your in serious trouble here and that *the only way that you have any hope is by us*. I don't know what your gonna think, now if you want an attorney, I'll tell you

what an attorney is gonna tell ya, an attorney is gonna tell ya don't talk to police. I can tell you that right now. Don't talk to the police. But, *the attorney doesn't go to jail, does he?*

"You know what the attorney does when you say that, the attorney knows that that's going to get a trial, even if he's appointed he gets paid by how much trial days." (J.A. 157-158).[28]

Truth is a frequent casualty under the present system. Police notes were the only record of the first interrogation sessions of Robert Jackson beginning when he was first arrested by Detroit Police. It can be fairly stated that abuse of authority thrives on discretion. Must we take the word of police that Jackson knowingly and intelligently waived his rights to counsel? Must we take the word of the police when they assert they made no threats and inducements to obtain a waiver and ultimately a confession? The real interrogation process would have remained unknown but for the tape recording of the interrogation of Michael White. In truth, Respondent Jackson was likely to have waived his rights only when he was convinced that "cooperation" was his "only hope."

The accuracy of alleged statements also suffers under police control. Where judges and juries must rely on the notes and memories of police officers, key evidence bearing on such difficult issues as the difference between manslaughter and murder

---

[28] It is interesting to compare the techniques used in Respondent's case with those described in the police interrogation manuals quoted in *Miranda*, *supra*. For example, in Inbau & Reid, Criminal Interrogation and Confessions (1962), at 111, cited at 384 U.S. 454, the authors suggested the following advice regarding the right to silence:

"Joe you have a right to remain silent. That's your privilege and I'm the last person in the world who'll try to take it away from you. If that's the way you want to leave this, O.K. But let me ask you this. Suppose you were in my shoes and I were in yours and you called me in to ask me about this and I told you, 'I don't want to answer any of your questions.' You'd think I had something to hide and you'd probably be right in thinking that. That's exactly what I'll have to think about you, and so will everybody else. So let's sit here and talk this whole thing over."

or between aiding and mere presence often takes a decided shift toward the inculpatory. This is hardly surprising when the accused's statement with few exceptions, is elicited in the spirit of "nailing" the accused on the highest charge and later related to the fact-finder in a feigned spirit of impartiality with all professional skill and "police-speak" detectives of more the 20 years can muster. See fn. 13, *supra*. In Jackson's case where tapes of his statements were eventually made, the likelihood of inaccuracy of the statement itself is admittedly reduced. But even here, the critical first dialogue bearing on the waiver of rights is missing.

A rule allowing post-arraignment waiver of the right to counsel after examination by a neutral magistrate or with counsel's advice[29] would be consistent with this Court's prior decisions. This Court has recognized that the right to counsel at this stage is clearly precious. See Part B, *supra*. Traditionally, waiver of the right to counsel has been a matter for a neutral judicial officer. See Part C, *supra*. Practically, a prophylactic rule would advance our criminal justice system. First unlike eyewitness identification, police reliance on confessions at the post-arraignment stage is *un*healthy and *un*necessary.[30]

---

[29] New York has established a rule requiring the cessation of any post-arraignment questioning unless an attorney is present and counsels the accused at the time of waiver. *People* v. *Cunningham*, 424 NYS 2d 421, 424; 49 N.Y.2d 203; 400 N.E.2d 360 (1980). Michigan has already recognized the efficacy of appointing counsel at the pre-indictment stage. Although an equally divided United States Supreme Court declined to take such a step, *Kirby* v. *Illinois*, *supra*, the Michigan Supreme Court, without dissent, held that an accused is Constitutionally entitled to counsel at pre-indictment identification procedures. *People* v. *Anderson*, 389 Mich. 155, 171-172, 186-187; 205 N.W.2d 461 (1973). As a result of this decision Wayne County, at least, has instituted a practice of having an appointed lineup counsel on call in the event the police choose to assemble a lineup for identification of an in-custody accused.

[30] In *Escobedo* v. *Illinois*, *supra*, 378 U.S., at 488-489, Justice

Second, hundreds of years of judicial history suggest that confessions are far less reliable than juries will believe.[31] Finally, lack of guidelines for police interrogation procedures breeds extensive litigation and disrespect for law. The police themselves may be victims as they are pressured to justify the violation of established Court rules to induce a confession and later are tempted to perjure themselves to validate the confession. The accused and others involved in these matters who witness such police misconduct find it difficult to support the criminal justice system in such an atmosphere of deceit. And

---

Goldberg wrote:

> "We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation.
>
> * * *
>
> "This Court also has recognized that history amply shows that confessions have often been extorted to save law enforcement officials the trouble and effort of obtaining valid and independent evidence. . . . *Haynes* v. *Washington*, 373 U.S. 503, 519; 83 S.Ct. 1336; 10 L.Ed.2d 513.
>
> "We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have *fear* that if an accused is permitted to consult with a lawyer, he will become aware of and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system." (footnotes omitted).

[31] Confessions have traditionally been excluded as unreliable if "extracted by any sort of threats or violence, [or] obtained by direct or implied promises, however slight, [or] by the exertion of any improper influence". *Bram* v. *United States*, 168 U.S. 532, 542-543; 18 S.Ct. 183; 42 L.Ed. 568 (1897). See also, the historical analysis in *Bram*, at 542-561. Scientific analysis also indicates that confessions, even where obtained voluntarily, are less reliable than a lay jury would assume. Kassin, S.M. & Wrightsman, LS., Coerced Confessions, Judicial Instruction, and Mock Juror Verdicts, *Journal of Applied Social Psychology*, 1981, 11, 6, pp. 489-506.

Practically speaking, when Robert Jackson exercised his right to counsel at arraignment, it is likely that his appreciation of the value of counsel differed very little from when the Livonia Police advised him. The magistrate at arraignment did not expound on counsel's value, he simply noted that Jackson had petitioned for counsel. The reasonable conclusion to be drawn is *not* that Robert Jackson was exercising a mere formality.[33] Jackson, as he had from the time of his arrest, was seeking every opportunity to preserve his freedom. When dependent upon police advice, the right to counsel, like the right to remain silent, was flim-flammed away as an obstacle to a deal. But when formally offered without the strings attached by police, the right to counsel was quite naturally embraced.

Robert Jackson's formal request for counsel at arraignment was a request for the assistance of counsel against the "prosecutorial forces of organized society" in all forums and forms where the State would seek to incriminate and convict. The State should not be permitted to circumvent this unequivocal request in open court by merely extending the same station-house *Miranda* advice which the Livonia Police could so neatly explain away in subsequent discussions about what these rights "really mean" to the defendant. The Livonia police should not be the ones[34] who say whether Respondent Jackson waived a right asked for and given in open court, which they think stands between them and wrapping up a conviction. Under any recognized standard, the prosecution cannot establish a valid waiver of Robert Jackson's right to counsel. Jack-

---

[33] As was stated by Mr. Justice White, concurring in *Michigan* v. *Mosley*, 423 U.S. 96, 110; 96 S.Ct. 321; 46 L.Ed.2d 313 (1975): "[T]he accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities insistence to make a statement without counsel's presence may properly be viewed with skepticism."

[34] "Sed quis custodiet ipsos Custodes? (But who is to guard the guards themselves?) Decimus Junius Juvenal. c. 50-130 A.D., Barlett, Jr.. *Familiar Quotations*, p. 139.

son's post-arraignment confession must be suppressed and the judgment of the Michigan Supreme Court affirmed.

CONCLUSION AND RELIEF

Once adversary proceedings have formally begun, custodial police interrogation is presumptively accusatory rather than investigatory. Police, as agents of the prosecutorial forces of the State, should not be engaged in attempting to advise an accused whether to waive precious constitutional rights which virtually no lawyer would advise be waived. This Court should hold that the right to counsel is not valid unless made pursuant to judicial examination or in the presence and with the advice of counsel.

WHEREFORE, for the reasons stated in Respondent's Brief, Respondent respectfully requests that this Honorable Court dismiss the Petition for Writ of Certiorari as improvidently granted or, in the alternative, affirm the judgment of the Michigan Supreme Court.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE
By: _____
JAMES KROGSRUD
(Appointed by this Court)
Assistant Defender
Third Floor, North Tower
1200 Sixth Avenue
Detroit, Michigan 48226
(313) 256-2814
Counsel for Respondent Jackson